IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1631

EDWARD L. KIRKLAND AND NATHANIEL HAYES, *et al.*,

Petitioners,

v.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Edward L. Kirkland and Nathaniel Hayes, individually and on behalf of the class they represent, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit of August 6, 1975 in this case.[1]

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[1] Respondents include, in addition to those named in the caption the following: Russell Oswald, in his capacity as Commissioner of the New York State Department of Correctional Services; the New York State Civil Service Commission; Ersa Poston, in her capacity as President of the New York State Civil Service Commission; Michael N. Scelsi and Charles F. Stockmeister, each in his capacity as Civil Service Commissioner; Albert M. Ribeiro and Henry L. Coons.

Opinions Below

1. The opinion of the District Court is reported at 374 F.Supp. 1361 and is in the Appendix, pp. 1a-19a.

2. The decree of the District Court is not officially reported, but is reprinted in 8 EPD ¶9675 and is in the Appendix, pp. 20a-21a.

3. The opinion of the Court of Appeals is reported at 520 F.2d 420 and is in the Appendix, pp. 22a-41a.

4. The order denying rehearing and the opinions dissenting from said denial are not officially reported, but are reprinted in 10 EPD ¶10,547 and are in the Appendix, pp. 42a-56a.

Jurisdiction

The Court of Appeals entered judgment August 6, 1975. Request for rehearing was denied December 10, 1975. February 19, 1976, Mr. Justice Marshall signed an order extending time for filing this petition until May 8, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Since 1961 there have been only two blacks and no Hispanics in supervisory positions in the entire New York State prison system. Substantial uncontradicted evidence demonstrated that this situation was caused by unconstitutional racial discrimination. As part of the remedy the District Court ordered that one minority be promoted to sergeant for every three whites so promoted

until the ratio of minority to white sergeants equals the ratio of minority to white officers—the entry level rank immediately below sergeant.

Did the District Court have the power to award this aspect of the relief or was the Court of Appeals correct in reversing on the ground that it was prohibited by the United States Constitution, the New York State Constitution and the New York Civil Service law?

2. Did the Court of Appeals err in reversing an award of counsel fees in this case, brought under 42 U.S.C. §§ 1981 and 1983, on the ground that such award was forbidden by *Alyeska Pipeline Service Co.* v. *Wilderness Society*?

Statutory and Constitutional Provisions Involved

Section 1981, 42 United States Code, provides:

> All persons within the judisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1983, 42 United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988, 42 United States Code, provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Section 2000e-5(k), 42 United States Code, provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Statement of the Case

As of May 1, 1973, of 122 permanent Correction Sergeants in the New York State Department of Correctional Service not one was black or Hispanic. Since 1961, there have been only two blacks and no Hispanics in supervisory positions in the entire New York State prison system; there is no evidence that any minorities held supervisory positions prior to 1961.[2]

The complaint filed April 10, 1973, challenged the legality, under the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983, of Civil Service examination 34-944 for promotion to Correction Sergeant (Male), administered October 14, 1972, on the ground that it was racially discriminatory in that it excluded disproportionate numbers of black and Hispanic candidates and was not job-related. An amended complaint of June 22, 1973, challenged Sergeant examinations administered prior to 1972 on the same ground.

Petitioners introduced substantial, unrebutted evidence that the gross under-representation of minorities among supervisors was brought about by the screening-out effects of the examinations.

For the 1972 examination, complete racial pass-fail statistics showed that whites passed at three times the rate of blacks and Hispanics, whites scored high enough to be likely to be appointed at six times the black rate, and no Hispanics scored high enough to be appointed. While complete data was not available for earlier examinations,

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[2] In the Correction Officer series of the New York State Department of Correctional Services, the entry level position is Correction Officer. Promotions are made to successive supervisory positions of Sergeant, Lieutenant, Captain, Assistant Deputy Superintendent, Deputy Superintendent and Superintendent on the basis of a series of written examinations.

it was undisputed that, of 995 whites and 46 blacks and Hispanics who took the 1970 exam and were still employed January 1, 1973, 9.4% of the whites and no minorities passed. Prior to 1970, at one correctional facility 25 blacks took the 1968 exam and 10 to 15 blacks took the 1965 exam. Seven black officers testified they took the Sergeant examination as many as four times and never scored high enough to be appointed. Six of these officers had, at time of trial, been serving as provisional Sergeants for as long as a year, all satisfactorily. Finally, there was uncontroverted expert testimony that blacks and Hispanics tend to achieve lower scores than whites on the type of examinations in issue.

The State respondents[3] attempted, unsuccessfully, to demonstrate that the 1972 examination was job-related. Petitioners established that the earlier exams were prepared by the same process and were similar in content to the 1972 examination. Respondents put on no evidence about job-relatedness of earlier examinations.

The District Court found that respondents had engaged in racial discrimination in that examination 34-944 had a disproportionate impact upon blacks and Hispanics (3a-7a) and respondents had not met their burden of establishing its job relatedness (7a-15a). As to past examinations, it found that "while there is evidence in the record of the discriminatory impact of the earlier tests, there is no evidence as to their job-relatedness" (14a). It enjoined the use of eligibility lists promulgated on the basis

[3] Respondents Ribeiro and Coons are provisional Sergeants who would have been appointed permanent Sergeants on the basis of their performance on examination 34-944 but for the District Court's temporary restraining order entered April 10, 1973. They applied and were permitted to intervene after the District Court entered its opinion.

of performance on examination 34-944 and ordered preparation of a new selection procedure (20a).

The District Court further ordered (a) that permanent appointments of Correction Sergeants prior to developing a new selection procedure be in a ratio of one black or Hispanic for each three whites until "the combined percentage of Blacks and Hispanics in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Blacks and Hispanics in the ranks of Correction Officers (Male)" (20a); (b) after adoption of a new selection procedure the same ratio of appointing one black for three whites was required to be maintained until the black-Hispanic sergeant percentage equalled their percentage among correction officers. (20a-21a)[4]

The District Court awarded attorneys' fees to petitioners on the ground that they were acting to vindicate the right to equal employment opportunities in the public sector (17a-19a).

On appeal, a panel of the Court of Appeals *affirmed* the provisions of the decree enjoining defendants from making appointments based upon the results of examination 34-944 and directing the development of a new selection procedure (28a-33a); *affirmed* that portion of the decree requiring quota appointments during the interim period prior to the development of a new selection procedure (38a-39a); but *reversed* the District Court's order with respect to minority goals and implementing ratios subsequent to development of a new selection procedure. It is this reversal, denying the power of the district judge

[4] The court did not specify the time at which the percentage of minority representation among correction officers was to be ascertained for purposes of determining whether the goal for minority Sergeants had been met. As of May 1, 1973, 395 of 4490 Correction Officers, 8.8%, were black or Hispanic.

to award such relief in such circumstances, for which certiorari is sought.

The panel's reversal of the grant of affirmative relief following establishment of a new procedure was based on the grounds that (1) there was insufficient proof of a "clearcut pattern of long-continued and egregious racial discrimination" because (a) complete statistical pass-fail data was unavailable, (b) petitioners failed to prove that the earlier exams were not job related, and (c) there was no claim of bad faith (34a-35a); and (2) a quota might result in minority individuals being given preference over identifiable non-minorities (persons ranking higher on a civil service list) which, the panel asserted, "would seem to be violative" of the United States Constitution, the New York State Constitution, and the New York Civil Service Law (35a-38a). The panel failed to consider, or to remand to the District Court to consider, alternative forms of relief to class members who had unconstitutionally and discriminatorily been denied appointment because of performance on pre-1972 examinations.

The panel also reversed the award of attorneys' fees in reliance on *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

Petitioners petitioned for rehearing, with a suggestion for rehearing *en banc*, of the issue of affirmative relief. The petition was denied (5-3), Chief Judge Kaufman and Circuit Judges Mansfield and Oakes dissenting (43a-56a). Judge Mansfield, Judges Oakes and Kaufman concurring, pointed out that the first ground for reversal, insufficient proof of past discrimination, was not supported by the record (49a-51a), and that the second, that a quota would result in "identifiable reverse discrimination", did not distinguish it from all the other cases in which Courts of Appeals for the Second Circuit and seven other circuits

had affirmed the imposition of hiring goals, and that the panel's denial of quota relief had the effect of providing "wholly inadequate relief to those aggrieved" (43a-49a, 51a-55a). In a separate opinion, Chief Judge Kaufman expressed the view that the court could "retrace the steps taken by previous panels . . . only by an *en banc* . . . or by a Supreme Court holding that [its] earlier decisions have been in error" (55a-56a).

Reasons for Granting the Writ

A. The District Court's Power to Award Complete Relief

The decision below restricts the power of a court of equity to award effective relief after a finding of racial discrimination in employment and is thereby in conflict with the decisions of seven other Courts of Appeals and of this Court. Such restriction, moreover, denies petitioners and their class positions they would have held but for respondents' discriminatory testing practices, contrary to principles asserted by this Court.[5]

This Court has consistently recognized the power, indeed the duty, of district courts to fashion relief "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future". *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). In employment cases, this Court has emphasized the necessity of granting relief which will, to the extent possible, place victims of racial discrimination in the position they would have been in but for the discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-419 (1975); *Franks* v. *Bow-*

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[5] The District Court defined plaintiffs' class to include all blacks and Hispanics who had taken examination 34-944 and either failed or scored too low to be appointed from the resulting eligible list (16a).

man Transportation Co., 44 U.S.L.W. 4356 (No. 74-728, March 24, 1976).

Relief from class-wide discriminatory exclusion from jobs, at entry and higher levels, in public and private employment, has frequently included numerical or percentage goals or quotas, utilizing hiring or promotional ratios to implement the goals. Courts of appeals for seven other circuits, as well as the court below in decisions prior to the instant one, have uniformly upheld the power of district courts to grant such relief.[6]

[6] *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 42 U.S. 910 (1975); *United States* v. *Wood, Wire & Metal Lathers, Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973), *aff'g in relevant part*, 354 F. Supp. 778 (D. Conn. 1973); *Vulcan Society of New York City Fire Dept.* v. *Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973); *Rios* v. *Enterprise Association Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *Patterson* v. *Newspaper & Mail Deliverers Union*, 514 F.2d 767 (2d Cir. 1975) (approving consent decree); *Commonwealth of Pennsylvania* v. *Sebastian*, 480 F.2d 917, *reported fully*, 6 [CCH] EPD ¶9037 (3rd Cir. 1973), *aff'g*, 368 F. Supp. 854, *reported fully*, 5 EPD ¶8558 (W.D. Pa. 1972); *Commonwealth of Pennsylvania* v. *O'Neill*, 473 F.2d 1029 (3rd Cir. 1973) (en banc), *aff'g in relevant part*, 348 F. Supp. 1084 (E.D. Pa. 1972); *Erie Human Relations Comm'n* v. *Tullio*, 493 F.2d 371 (3rd Cir. 1974); *Oburn* v. *Shapp*, 521 F.2d 142 (3rd Cir. 1975); *Local 53, International Association of Heat & Frost I & A Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *United States* v. *IBEW Local 212*, 472 F.2d 634 (6th Cir. 1973); *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Crockett* v. *Green*, 11 EPD ¶10,781 (7th Cir. 1976); *Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971), *aff'g*, 315 F. Supp. 1202 (W.D. Wash. 1970).

Courts of appeals for four circuits have reversed a district court's failure to order such relief.[7] With the exception of two recent Second Circuit decisions which relied upon the panel's decision in the instant case,[8] the only appellate decision to have reversed a grant of quota relief is *Patterson* v. *American Tobacco Co.*, 11 EPD ¶ 10,728 (4th Cir. 1976), where the court, recognizing the appropriateness of such relief in certain circumstances, found that under the facts of that case it was not necessary.

The legislative history of the 1972 amendments to Title VII demonstrates that such relief accords with the intent of Congress. In 1972, two amendments were proposed to prohibit the type of remedy which the court below struck down. Both were defeated. Floor managers of both parties explained that they opposed the amendments because they would prevent District Courts from providing adequate remedies for past discriminatory practices. United States Senate, Subcommittee on Labor of the Committee of Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, November 1972, pp. 1017, 1038-1075, 1681, 1714-1717.

In analogous contexts, this Court has upheld the power of district courts to shape remedies for past constitutional

[7] *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 418-20 (5th Cir. 1974), *reversed on other grounds*, 44 U.S.L.W. 4356 (No. 74-728 March 24, 1976); *United States* v. *Carpenters, Local 169*, 457 F.2d 210 (7th Cir. 1972), *cert. denied*, 409 U.S. 851 (1972); *United States* v. *N. L. Industries*, 479 F.2d 354 (8th Cir. 1973).

[8] *Chance* v. *Board of Examiners*, 11 EPD ¶10,633 (No. 75-7161 Jan. 19, 1976), *petition for rehearing filed* Feb. 2, 1976); *EEOC* v. *Local 638 . . . Local 28 of the Sheet Metal Workers Assoc.*, 11 EPD ¶10,740 (No. 75-6079 March 8, 1976), *petition for rehearing filed*, April 12, 1976.

violations by taking into account black-white ratios. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969).

The element that makes such affirmative provisions both lawful and necessary is proof of prior discrimination or its continuing effects. *Louisiana* v. *United States, supra; cf. Franks* v. *Bowman Transportation Co., supra.* And the appropriateness in this particular case is manifest, for as Judge Mansfield pointed out, rejecting goals denies "non-white correction officers the long overdue promotions to which they were entitled [and] . . . by requiring them to compete afresh with late comers once a non-discriminatory test is devised . . . postpones their promotions even further" (51a). Yet, the alternative remedy which would "adhere most closely to the merit principle, would be to void and recall all past promotions made on the basis of the non-validated tests. . . . [But] such relief . . . would be extremely harsh. . . ." (52). The district judge took a middle ground, well within the powers of a court of equity.[9]

One ground given by the panel for reversal was the "paucity of proof" of past discrimination (35a.). But this argument is not supported by the record. Substantial uncontradicted evidence demonstrated the discriminatory effects of respondents' past testing practices. While complete statistical pass-fail evidence was not introduced, because it was not available, the argument that such evidence is necessary to a finding of discriminatory impact has been rejected, expressly or by implication, by this Court and several Courts of Appeals. *Griggs* v. *Duke Power Company,* 401 U.S. 424, 430 and n. 6 (1971), Courts of Appeals for the First, Second, Eighth and District of Columbia Circuits have found discriminatory impact in the absence of complete pass-fail data.[10]

[9] See M. Slate, *Preferential Relief in Employment Discrimination Cases,* 5 Loyola Univ. L. J. 315 (1974) for a comprehensive rationale of the law of this subject.

The panel's second ground for denying that there is equitable power to grant quota relief upon a finding of racial discrimination was that the non-minority officers over whom the minority officers would be preferred for promotion were identifiable. However the identifiability *vel non* of those whose expectations might be diminished has never been a criterion for determining the appropriateness of affirmative relief (54a). In virtually all of the cases in which preferences have been ordered, the identity of those who possessed expectations deriving in part from the continuing effects of past discrimination was known. See, e.g., *Boston Chapter, NAACP* v. *Beecher,* 504 F.2d 1017, 1026-1027 (1st Cir. 1974). Nor has such relief been confined to entry level jobs. See *United States* v. *N. L. Industries,* 479 F.2d 354, 377 (8th Cir. 1973); *Crockett* v. *Green,* 11 EPD ¶10,781 (7th Cir. 1976). Indeed the panel decision recognized existence of the power to appoint according to quotas until the time when new selection procedures would be developed, but denied its existence thereafter, when the use of such power would be most meaningful.

In sum, the decision of the court below creates a conflict with decisions of other circuits concerning the equitable

[10] *Boston Chapter, NAACP* v. *Beecher,* 504 F.2d 1017, 1020-1021 (1st Cir. 1974); *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 393 (2d Cir. 1973); *Jones* v. *New York City Human Resources Administration,* 11 EPD ¶10,664 (2d Cir. 1976); *Rogers* v. *International Paper Co.,* 510 F.2d 1340, 1348-49 (8th Cir.) vacated and remanded on other grounds, 46 L.Ed. 2d 29 (1975); *Douglas* v. *Hampton,* 512 F.2d 976, 982-983 (D.C. Cir. 1975).

power of district judges to award meaningful relief. This Court, we respectfully submit, should resolve the conflict.[11]

B. Attorneys' Fees

This Court has not yet decided whether a district court has the power to award attorneys' fees to prevailing plaintiffs in cases of racial discrimination in employment brought under 42 U.S.C. §§1981 and 1983. While there is language in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975) to support the decision of the Court below, see especially *id.* at 270 n. 46, petitioners respectfully submit that the rationale underlying *Alyeska,* considered in conjunction with 42 U.S.C. §1988 and 42 U.S.C. §2000e-5(k), requires a contrary result.

In *Alyeska,* a case involving the enforcement of certain laws for the protection of the environment, this Court held that in the absence of express statutory authorization the courts could not, except in limited classes of cases, award attorneys' fees. But there is express statutory authorization, 42 U.S.C. §1988, which, we submit, warrants award of counsel fees in this case. Sections 1981 and 1983 do not specify any of the remedies available for the rights they create. Rather, Section 1988 instructs the federal courts in civil rights cases to exercise their jurisdiction in conformity with the laws of the United States and, indeed, if they are deficient, state laws, to provide remedies which will most fully effectuate the substantive rights at issue. *Moor* v. *County of Alameda,* 411 U.S. 693, 702-705 (1973).

[11] Subsequent to the denial of rehearing in the instant case, this Court decided *Franks* v. *Bowman Transportation Co., supra.* While the issue resolved in *Franks,* the propriety of granting retroactive seniority to discriminatees, was not raised in the court below, a remand to the Court of Appeals for reconsideration in the light of *Franks* might afford complete relief to those members of plaintiffs' class who were denied promotion to Sergeant on the basis of their performance on pre-1972 examinations.

Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* for the purpose of eradicating discriminatory employment practices; it gave a significant role to private litigants in the enforcement process. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44-45 (1974). In Section 706(k) of Title VII, 42 U.S.C. §2000e-5(k), Congress provided for the award of attorneys' fees to successful plaintiffs, and this Court has recognized the importance of implementing this provision to effectuate the purpose of Title VII. *Albemarle Paper Co.* v. *Moody,* 405, 415 (1975).

Thus, unlike the situation presented to the Court in *Alyeska,* where Congress had not seen fit to authorize the award of attorneys' fees in environmental litigation, there is, in section 706(k) of Title VII, a clear expression of Congressional intent to authorize federal courts to award attorney's fees to vindicate the national policy of eliminating racial discrimination in employment, a policy advanced equally through suits brought pursuant to Sections 1981 and 1983 and Title VII.[12]

Accordingly, by assimilating §706(k) of Title VII to §§1981 and 1983 as directed by §1988, the district court in the instant case was authorized to award attorneys' fees to petitioner, and the reversal of said award by the court below was contrary to the principle enunciated by this Court in *Alyeska,* as well as to the rule expressed in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968).

Certiorari should be granted also, we submit, to resolve this important ambiguity resulting from *Alyeska.*

[12] *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47 and n.7; *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975).

CONCLUSION

The Court should grant a Writ of Certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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May 1976

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
73 Civ. 1548

EDWARD L. KIRKLAND, et al., *Plaintiffs*,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al., *Defendants*.

Filed: April 2, 1974

Jack Greenberg, Jeffry A. Mintz, Morris J. Baller, Deborah M. Greenberg, New York City, for plaintiffs.

Louis J. Lefkowitz, Atty. Gen., of the State of New York, New York City, for defendants; Judith A. Gordon, Asst. Atty. Gen., Stanley L. Kantor, Deputy Asst. Atty. Gen., of counsel.

OPINION

LASKER, District Judge.

This suit is another in an ever-extending series of challenges to civil service examinations. Plaintiffs, who are Correction Officers,[1] provisionally appointed to the rank of Correction Sergeant (Male), contend that the test for promotion and permanent appointment to that position discriminated against them on the basis of race. They seek to represent all Black and Hispanic Correction Officers and provisional Correction Sergeants who failed the examination, who passed it but ranked too low to be appointed or who were deterred by the appointment system from seeking promotion. Defendants are the New York State Department of Correctional Services, its Commissioner, and the New York State Civil Service Commission and its Commissioners.

The action is brought under the Fifth and Fourteenth Amendments to the Constitution and under the Civil Rights Act (42 U.S.C. §§ 1981 and 1983) and its jurisdictional counterpart (28 U.S.C. §§ 1343(3) and (4)). Plaintiffs make no claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e to 2000e-17), despite the availability, by recent amendment, of remedies under it against states and municipalities (*id.* at § 2000e(a)).[2]

1. Originally, there was a third named plaintiff, the Brotherhood of New York State Correction Officers, Inc. However, this plaintiff withdrew at the commencement of the trial.

2. Defendants urge us to apply the doctrine of primary jurisdiction and defer the case to the Equal Employment Opportunity Commission on the theory that by extending Title VII to cover states and municipalities Congress intended to oblige persons seeking redress against governmental discrimination in employment to resort in the first instance to the EEOC. This contention has been resoundingly rejected in cases involving suits against private employers under 42 U.S.C. § 1981. Macklin v. Spector Freight Systems, Inc., 156 U.S.App.D.C. 69, 478 F.2d 979, 996-997 (1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623-624 (8th Cir. 1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir.), cert. denied, 404 U.S. 998, 92 S.Ct. 560, 30 L.Ed.2d 551 (1971); Young v. International Telephone & Telegraph Co., 438 F.2d 757, 763 (3rd Cir. 1971); Sanders v. Dobbs House, Inc., 431 F.2d 1097, 1100-1101 (5th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971). Furthermore, cases in this Circuit involving suits which, like the instant case, were brought under § 1983 hold that the amendment to Title VII was not intended to foreclose recourse to the earlier Civil Rights Act. Vulcan Society v. Civil Service Commission, 490 F.2d 387, at 390, n. 1 (2d Cir., 1973); Bridgeport Guardians, Inc., v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1334, n. 1 (2d Cir. 1973).

In spring, 1972, the 1970 eligible list for Sergeant appointments was exhausted. To fill needed positions pending establishment of a new list, the Department of Corrections appointed provisional Correction Sergeants, in August, 1972, to hold their posts until permanent appointments could be made. Both named plaintiffs were appointed at that time.

Upon request of the Department of Corrections, the Civil Service Commission prepared a promotional examination which was administered on October 14, 1972. That examination, 34-944, was taken and failed by plaintiffs and is the subject of this action.

34-944 was taken by 1,383 persons,[3] including 1,261 whites, 103 Blacks and 16 Hispanics. The candidates examinations were graded and the passing grade was established at 70%. After adjustment for veteran's preference and seniority, those who passed were ranked by grade and an eligible list was promulgated on March 15, 1973. On April 10, 1973, this suit was filed and a temporary restraining order entered preventing defendants from making appointments from the list and from terminating the provisional appointments of plaintiffs or members of the class. By modification and stipulation, the restraining order was extended to maintain the status quo until a decision on the merits.

The ground rules for cases such as this have been thoroughly elucidated by recent decisions of the Court of Appeals for this Circuit. We note in particular Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission (*"Vulcan"*), 490 F.2d 387 (2d Cir. 1973), aff'g, 360 F. Supp. 1265 (S.D.N.Y.1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission (*"Guardians"*), 482 F.2d 1333 (2d Cir.), aff'g in part and rev'g in part, 354 F.Supp. 778 (D. Conn.1973), and Chance v. Board of Examiners (*"Chance"*), 458 F.2d 1167 (2d Cir. 1972), aff'g, 330 F.Supp. 203 (S.D. N.Y.1971). To summarize the approach adopted by the cases, plaintiffs must first establish a prima facie case showing that the examination has had "a racially disproportionate impact." *Vulcan*, 490 F.2d at 391; Castro v. Beecher (*"Castro"*), 459 F.2d 725, 732 (1st Cir. 1972). If they succeed, it then becomes defendants' burden to justify the examination's use despite its differential impact by proving that it is job-related (*Vulcan*, 490 F.2d at 391) and that any disparity of performance results solely from variance in qualification and not from race (Griggs v. Duke Power Co., 401 U.S. 424, 430-431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Chance*, 330 F. Supp. at 214). Discharging this burden would entitle defendants to judgment; failure would, of course, require the court to take the third step of determining what remedy would be appropriate.

As is typical in cases of this type, plaintiffs do not allege that defendants have intentionally discriminated against their class. Such an allegation is not a necessary part of their case. *Chance*, 458 F.2d at 1175-1176. As the Supreme Court stated in *Griggs*:[4]

> "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432, 91 S.Ct. at 854.

However, the fact that the alleged discrimination is not claimed to be deliberate modifies the burden placed on the state to justify its actions. Intentional racial discrimination would require the state to demonstrate a compelling necessity for its selection methods. *Cf.* Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). However, "the Supreme Court has yet to apply that stringent test to a case such as this, in which the allegedly unconstitutional action unintentionally resulted in discriminatory effects." *Chance*, 458 F.2d at 1177. Agonizing over whether the state can discharge its constitutional obligations merely by suggesting a rational basis for the examination's use or whether it must satisfy a more demanding standard, short of the compelling interest test, is unnecessary. The guidelines have been so refined by the cases that no ambiguity obscures the road to determination regardless of the difficulties of classification which may remain to plague the theorists. *Guardians*, 482 F. 2d at 1337. The decisions impose on the state "a heavy burden of justifying its contested examinations by at least demonstrating that they were job-related." *Chance*, 458 F.2d at 1176; *see also Guardians*, 482 F.2d at 1337. This "heavy burden" is discharged if the state "come[s] forward with convincing facts establishing a fit between the qualification and the job." *Vulcan*, 490 F.2d at 393, quoting *Castro*, 459 F.2d at 732. Once the state proves its case to that extent, it need not establish, as would be required under the compelling interest approach, that no alternate means of selection are open to it. *Castro*, 459 F. 2d at 733; *see also Vulcan*, 490 F.2d at 393.

However clearly the issues are delineated by well-established precedent, nothing can make easy the task of deciding a case such as this. The competing interests are vital to the named parties, to other individuals who may be affected by the outcome and to the public at large. Plaintiffs strive to insure for themselves and the minorities they seek to represent the fair treatment in the public employment sphere which the Constitution guarantees. Their efforts bring them into conflict with those individuals who passed the challenged examination and have a vested interest in securing the promotions which are rightfully theirs if the examination is upheld. For both groups, the outcome is critical since it affects their ability to earn a living by advancing in the profession of their choice. Last and perhaps most important is the public's stake in establishing and maintaining a system of prison administration which is both competent and representative of the population. As members of the public, we include, of course, the inmates of the prison system who, more than anyone else in the community, are directly affected by the quality of correctional supervision. The delicacy of the decision is further compounded by the potential for heightened tension which attends any direct conflict along racial and cultural lines.

Bearing these factors in mind, we proceed, with caution but without more ado, to a consideration of plaintiffs' prima facie case.

I. DISPROPORTIONATE IMPACT.

Plaintiffs rest their case on the following uncontested statistics. The figures computed by defendants indicate that White candidates passed 34-944 at a rate of 30.9%, while only 7.7% of Black candidates and 12.5% of Hispanic candidates achieved a passing score. (Transcript at 500). That is, Whites passed at a rate approximately four times that of Blacks and 2.5 times that of Hispanics. Defendants concede the statistical significance of these differences. (Post-trial Memorandum at I-4.)

Plaintiffs' evidence reveals an even more startling disparity among those who ranked high enough to be appointed. The Department of Corrrections intends to appoint a maximum of 147 per-

3. The total candidate pool was approximately 1,441. However, for reasons not apparent from the record, the computer display provided by defendants to describe candidate performance (PX-12) indicates the performance of only 1,383 candidates. Since both parties have based their calculations on that figure, we will do likewise.

4. *Griggs* arose under Title VII of the Civil Rights Act of 1964; however, the same approach to employment discrimination cases has generally been followed in § 1983 cases as in Title VII cases. *Vulcan*, 490 F.2d at 394, n. 9; *Castro*, 459 F.2d at 733.

sons from the present eligible list.[5] A computer display of the results of 34–944 (PX–12) reveals that, of 159 persons who scored 57 or above (a group large enough to satisfy the Department's projected needs), 157 were White, two were Black and none was Hispanic. Thus, 12.5% of the Whites who took 34–944 are likely to be appointed, while only 1.9% of Black candidates and no Hispanics have a chance at appointment. These results would lead to the appointment of Whites at 6.5 times the rate of Blacks and would bar completely the appointment of Hispanics.

The statistical significance of these figures is established beyond dispute by the earlier cases. In *Chance*, *Guardians* and *Vulcan*, the impact was less drastically disproportionate among the races. In *Chance*, the passing rate for Whites was 1.5 times that of Blacks and Hispanics (330 F.Supp. at 210); in *Guardians*, Whites passed at 3.5 times the rate for Blacks and Hispanics (354 F.Supp. at 784); and in *Vulcan*, Whites scored high enough to have a chance at appointment at 2.8 times the rate for Blacks and Hispanics (360 F.Supp. at 1269).

Defendants do not challenge the accuracy of plaintiffs' figures (for which they are the source) nor do they deny the statistical significance of the differential impact indicated by them. They contend, however, that the approach taken by plaintiffs, that is, consideration of the statistics as to the statewide impact of the entire exam, does not accurately reflect the performance of the groups in relation to each other. They urge us, rather, to base our determination of racial impact on the candidates' performances facility by facility rather than throughout the state. They contend that otherwise it is impossible to determine whether minority candidates are succeeding less well as a group because of their racial and cultural backgrounds or because they are located at facilities which, for reasons unspecified, prepare their officers less well for the promotional exam. In fact, the great majority of minority candidates are located at Ossining (82 Blacks out of a total of 104, 9 Hispanics out of a total of 16) with the second largest concentration of Blacks at Greenhaven (8). (PX–12, codes 1007 and 1008.) Defendants argue that if both Whites and minority candidates at Ossining perform less well than persons —White, Black or Hispanic—employed at other facilities, then 34–944 has not been shown to differentiate on the basis of race. Second, defendants contend that, since 34–944 is composed of five subtests, comparative performance on each subtest should be determinative rather than performance on the test as a whole. If these approaches are adopted, they claim, the three groups of candidates will be shown not to have performed sufficiently differently to make out a prima facie case of disproportionate impact.

To support their argument that the results of 34–944 are relevant only if separated by facility, defendants rely on an analysis of the computer display of examination results (PX–12) drawn up by Kenneth Siegel, the Associate Personnel Examiner who was responsible for the preparation of 34–944. He analyzed the performances of the groups in terms of mean scores on the total exam and on each of the five subtests at Ossining, Green Haven, all the other facilities and all the facilities taken together (DX–DD). The reason for selecting Ossining and Green Haven for special attention was the concentration of minority candidates at those facilities. Siegel's written analysis (DX–DD) does not indicate passing rates, but only mean scores. However, Siegel testified that the difference in passing rates between Whites and Blacks at Green Haven (Transcript at 511) and all other facilities except Ossining is not statistically significant (Transcript at 509, 515). Based on Siegel's testimony, defendants argue that as a result plaintiffs' prima facie case fails with respect to all facilities except Ossining.

5. The Department of Corrections appointed 87 persons from the eligible list based on 34–944 in April, 1973. (PX–2, answer to Interrogatory No. 39.) On May 29, 1973, the Department indicated that it intends to make another 40–60 appointments from the list within roughly two years from that date. (PX–2, answer to Interrogatory No. 40.) Thus, a maximum of 147 persons will be appointed through May of 1975. No appointments are likely after that date, since another promotional exam will be given in 1974 (PX–42, p. 4., 7th par.) and the eligible list from 34–944 will therefore expire in 1974 or early 1975.

The principal obstacle to accepting defendants' analysis is that it is premised on assumptions which are factually erroneous. Their own statistics bely their theory. Siegel's analysis (DX–DD) of the computer display (PX–12) reveals not only that the mean score for Whites state-wide (48.9) is superior to that of Blacks (43.2) and Hispanics (44.2), but also that the mean scores at Ossining, Green Haven and other facilities considered separately reflect the same pattern. Whites at Ossining achieved a mean score of 47.32, compared with 42.96 for Blacks and 41.56 for Hispanics. The disparity at Ossining is virtually identical to that derived from a comparison of statewide figures for Whites and Blacks (48.9 to 43.2) and is greater than the state-wide difference between Whites and Hispanics (48.9 to 44.2). This effectively refutes defendants' theory that minority candidates generally performed less well than Whites solely because they were concentrated at Ossining where candidates as a whole did less well. The range at Green Haven is almost as striking and indicates again a greater variance than is found statewide between Whites and Blacks and an almost identical disparity as that found state-wide between Whites and Hispanics: Whites, 48.68; Blacks 42.00; Hispanics, 44.00. A comparison of results at facilities other than Ossining and Green Haven bears out the trend: Whites, 49.00; Blacks, 45.21; Hispanics, 48.17. It is true that Hispanics at these facilities fared better than at Ossining and Green Haven and their scores more closely approximate the performance of Whites. However, the importance of this discovery is somewhat discounted by the small size of the sample (6 Hispanic candidates) which decreases the possibility of statistical accuracy (Transcript at 936–37). Furthermore, Siegel's analysis indicates that the standard deviation in mean scores between Whites and Blacks was statistically significant at Ossining, Green Haven and all other facilities as well as state-wide, and the same is true of Whites and Hispanics at Ossining where the largest concentration of Hispanics is found. (DX–DD.)

An analysis of passing rates, which is more appropriate since it is the passing score which determines a candidate's eligibility for appointment, is even more illuminating. Siegel testified that there was a significant difference between the passing rates of Whites and Blacks at Ossining (Transcript at 509), but that no such difference existed between Whites and Blacks at Green Haven and facilities other than Ossining and Green Haven and none between Whites and Hispanics at Ossining, or other facilities. (Transcript at 509–515.) He did not compare the passing rates of Whites and Hispanics at Green Haven because there was only one Hispanic candidate at that facility. (Transcript at 511.) Nor did he testify as to the difference between the passing rates of Whites and Hispanics at facilities other than Ossining and Green Haven. Siegel is correct that the disparity in passing rates between Whites and Blacks at Ossining is significant: Whites passed at a rate of 23.5% and Blacks at a rate of 4.9%. (PX–33.) However, his testimony as to Blacks at Green Haven and at other facilities and as to Hispanics at Ossining flies in the face of the figures in evidence. To the contrary, comparison of the groupings mentioned above indicates in each instance a significant disparity between the passing rate of White and minority candidates. Whites at Green Haven passed at a rate of 31.6%, while Blacks and Hispanics achieved rates of only 12.-

3% and 0%[6] respectively. 30.7% of Whites at facilities other than Ossining and Green Haven[7] passed 34–944, while only 14.3% of Blacks passed. Although Hispanics at facilities other than Ossining and Green Haven passed at a higher rate than Whites (33.3% compared to 30.7%), the reliability of this computation is put in doubt by the smallness of the sample. Hispanics at Ossining, on the other hand, passed at a rate of 0% compared to a White passing rate of 23.5%. Accordingly, contrary to Siegel's conclusion, the disparity between White and minority candidates was significant with regard to Blacks at Ossining, Green Haven and all other facilities, as well as state-wide, and was significant with regard to Hispanics at Ossining, where the largest number of Hispanics are located.

These computations destroy the factual premise of defendants' argument that minority performance reflects the facilities in which they concentrated rather than their minority characteristics. We would in any event be forced to reject defendants' theory as a matter of law, even if it could be factually substantiated. Attempts to correlate racial performance to such non-racial characteristics as quality of schooling or educational and cultural deprivation have been rejected as irrelevant to rebut a statistical prima facie case. As the district court opinion in *Guardians* stated:

> "More fundamentally, this data [as to quality of schooling] fails to remove the *prima facie* showing of discrimination because it does not alter but only tries to explain the difference in passing rates." 354 F.Supp. at 785; *see also Vulcan*, 360 F.Supp. at 1272. *Cf. Castro, supra.*

The controlling decisions clearly posit that, in order to shift to defendants the burden of showing that performance on the examination correlates to performance on the job, plaintiffs are required to do no more than demonstrate that minority candidates as a whole fared significantly less well than White candidates, regardless of possible explanations for their poorer performance. To quote *Guardians* once more:

> "The point is that a discriminatory test result cannot be rebutted by showing that other factors led to the racial or ethnic classification. The classification itself is sufficient to require some adequate justification for the test." *Id.*, 354 F.Supp. at 786.

Finally, we fail to understand the relevance of defendants' attack on plaintiffs' prima facie case. Defendants appear to concede that, at the very least, Blacks at Ossining who failed 34-944 have established their right to challenge its job relatedness. (Post-trial Memorandum at I–11.) This group constitutes two-thirds of the proposed plaintiff class (77 out of 117 Blacks and Hispanics combined), but if even a far smaller number had succeeded in proving disportionate impact detrimental to themselves, defendants would be obliged, as they themselves concede, to prove job relatedness.

We turn to defendants' second challenge to plaintiffs' case. Siegel's analysis of the computer display indicates that although there is a statistically significant difference in the total mean scores of Whites and Blacks and Whites and Hispanics state-wide and at Ossining, and, as to Blacks, at Green Haven and facilities other than Ossining and Green Haven, not every subtest indicates such a disparity. (DX–DD.) It is unnecessary to detail the permutations sub-test by sub-test and facility by facility, since the suggested approach itself is invalid as a matter of law. The cases indicate that a showing that the overall examination procedure produced disparate results cannot be rebutted by fragmenting the process and demonstrating that separately the parts did not differentiate along racial or cultural lines. In *Chance*, for example, the fact that minority candidates had a higher passing rate than White candidates on seven out of fifty examinations did not vitiate plaintiffs' proof that the series of examinations as a whole discriminated against them and their class. 330 F.Supp. at 211; *see also Guardians*, 354 F.Supp. at 786. In *Vulcan*, the very question whether a single examination procedure can properly be subdivided and the parts considered separately, was raised and Judge Weinfeld rejected the proposition:

> "Moreover, the examination may not be truncated; whether or not it has an adverse discriminatory impact upon minority groups should be considered in terms of the total examination procedure. Here there can be no doubt, whatever the relative impact of component parts, that in end result there was a significant and substantial discriminatory impact upon minorities. . . ." 360 F.Supp. at 1272.

Any other approach conflicts with the dictates of common sense. Achieving at least a passing score on the examination in its entirety determines eligibility for appointment, regardless of performance on individual sub-tests. Accordingly, plaintiffs' case stands or falls on comparative passing rates alone. Thus, in law and in logic, we find defendants' approach unwarranted.

Rejection of defendants' dual attack on plaintiffs' showing of differential impact leaves no doubt that plaintiffs' prima facie case has been amply established. Accordingly, the burden of proof swings to defendants to demonstrate that 34–944 is job-related. We turn to a consideration of that question.

II. JOB-RELATEDNESS.

"Validation" is the term of art designating the process of determining the job-relatedness of a selection procedure. Cases and official guidelines recognize three validation methods: criterion-related validation, construct validation and content validation. *See, e. g., Vulcan*, 490 F.2d at 394–396; *Guardians*, 482 F.2d at 1337–1338 and 354 F. Supp. at 788–789; Equal Employment Opportunity Commission Testing and Selecting Employees Guidelines ("EEOC Guidelines"), 29 C.F.R. § 1607, at § 1607.5(a); American Psychological Association Standards for Educational & Psychological Tests and Manuals ("APA Standards") (PX–26) at 12–13.

A. Criterion—Related Validation.

Decisions in this Circuit and the EEOC guidelines agree that criterion-related or empirical validation is preferable to other validation methods. *Guardians*, 482 F.2d at 1337 and 354 F.Supp. at 788; *Vulcan*, 360 F.Supp. at 1273; EEOC Guidelines at § 1607.5(a). In *Vulcan*, Judge Weinfeld defined the two methods which are subsumed under the criterion-related rubric:

> "Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job-related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job." 360 F.Supp. at 1273.

6. Inasmuch as there was only one Hispanic candidate from Green Haven, the importance of this comparison should not be exaggerated.

7. The figures for White, Black and Hispanic passing rates at facilities other than Ossining and Green Haven are not in the record, but can be readily computed from those which are in evidence (see PX–33). The number of Whites at "other facilities" is 1069 (1264, the total of White candidates, minus 195, which is the sum of White candidates at Ossining, 81, and Green Haven, 114). The number of Whites at "other facilities" who passed is 328 (383 minus 55, the sum of 19 at Ossining and 36 at Green Haven). Accordingly, the passing rate is 30.7%. Blacks at "other facilities" number 14 (103 minus 89, which is 81 at Ossining and 8 at Green Haven). Two Blacks at "other facilities" passed (7 minus 5). As a result, the passing rate is 14.3%. There were six Hispanics at "other facilities" (16 minus 10, nine at Ossining, one at Green Haven). Two passed and the rate is 33.3%.

The methodology which unites the two types of criterion-related validity requires two fundamental steps:

> "Criteria must be identified which indicate successful job performance. Test scores are then matched with job performance ratings for the selected criteria." *Guardians*, 482 F.2d at 1337.

The EEOC's minimum standards for validation (EEOC Guidelines at § 1607.5) require an employer to undertake criterion validation if it is feasible. They demand "empirical evidence in support of a test's validity . . . based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in [APA Standards]". *Id.* at subdiv. (a). They state further that "[e]vidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible." *Id.*

Because this case was not brought under Title VII and no resort has been made to the EEOC as would be required under the 1964 Act, the Commission Guidelines are not binding and cannot finally resolve the issue whether criterion-related validation is required. However, the Guidelines are recognized as relevant and useful as a "helpful summary of professional testing standards" (*Vulcan*, 490 F.2d at 394, n. 8) and as "persuasive standards for evaluating claims of job-relatedness" (*Vulcan*, 360 F.Supp. at 1273, n. 23).[8]

Notwithstanding the Guidelines' mandate of criterion-related validation and despite suggestions in some cases that only that method suffices to carry the burden of proof as to job-relatedness (*Vulcan*, 360 F.Supp. at 1273; *Guardians*, 354 F.Supp. at 789), no case in this Circuit has gone so far as to hold that failure to test an exam by criterion validation or to demonstrate the nonfeasibility of that approach justifies setting the exam aside even if it has been content validated. Those cases which have indicated a preference for criterion-related validation have also found a lack of content and construct validation before striking down an examination. Furthermore, the Court of Appeals for this Circuit has recently abjured an absolutist approach, stating that "failure to use [criterion-related validation] is not fatal." *Vulcan*, 490 F.2d at 395.

Defendants specifically admit that 34-944 has not been validated by the criterion-related approach. (Transcript at 389; PX-2, answer to interrogatory 26.) However, in view of Judge Friendly's unambiguous statement in *Vulcan* that criterion-related validation is not required if the examination can be validated by other means, we turn our attention to the other validation methods.

B. Construct Validation.

The second recognized method of validation is "construct validation." As defined by Judge Friendly in *Vulcan*, this method "requires identification of general mental and psychological traits believed necessary to successful performance of the job in question. The qualifying examination must then be fashioned to test for the presence of these general traits."[9] *Vulcan*, 490 F.2d at

8. *See also* Carter v. Gallagher, 452 F.2d 315, 320, 326 (8th Cir. 1971), adopted in relevant part, 452 F.2d 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); Fowler v. Schwarzwalder, 351 F.Supp. 721, 724 (D.Minn. 1972); Pennsylvania v. O'Neill, 348 F.Supp. 1084, 1103 (E.D.Pa.1972), aff'd in relevant part by an equally divided court, 473 F.2d 1029 (3d Cir. 1973) (en banc); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351 (N.D.Cal.1972).

9. The common example which is given to highlight the different characteristics of the content and construct validation methods involves an examination for the position of typist. A content valid test would require the applicant to type. In such an instance the content of the job and of the exam is identical. A construct valid approach would identify certain traits essential to success as a typist, such as ability to concentrate, perseverance and attention to detail, and would examine the applicant for those traits. *Vulcan*, 490 F.2d at 395.

395. We mention this method only for the sake of completeness; none of the parties has introduced evidence that its use would be appropriate here or that its requirements have been fulfilled.

C. Content Validation.

We reach finally the dispositive issue in the case: Have defendants demonstrated that 34-944 is a content valid examination?

Initially, it is essential to determine precisely what proof is necessary to satisfy the requirements of content validity. Judge Weinfeld's definition in *Vulcan* reflects the principles established by case law and professional publications:

> "An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." 360 F.Supp. at 1274 (footnotes omitted). *See also*, *Vulcan*, 490 F.2d at 395; *Guardians*, 482 F.2d at 1338.

Accordingly, defendants must demonstrate not only that the knowledge, skills and abilities tested for by 34-944 coincide with some of the knowledge, skills and abilities required successfully to perform on the job, but also that 1) the attributes selected for examination are critical and not merely peripherally related to successful job performance; 2) the various portions of the examination are accurately weighted to reflect the relative importance to the job of the attributes for which they test; and 3) the level of difficulty of the exam matches the level of difficulty for the job. In sum, to survive plaintiffs' challenge, 34-944 must be shown to examine all or substantially all the critical attributes of the sergeant position in proportion to their relative importance to the job and at the level of difficulty which the job demands.

The problem which confronts the trier of fact when charged with applying these principles to a given situation is that normally, and it is the case here, he is expert neither in psychometrics nor in the field in which the examination is given. Nevertheless, he is required to make factual determinations 1) whether the examination meets professionally acceptable standards of technical adequacy and 2) whether it has content validity for the job in question. (*See* EEOC Guidelines, 29 C.F.R. at § 1607.5(a).)[10] To overcome the obstacle presented by lack of expertise, the cases have developed an approach which minimizes the obvious dangers inherent in judicial determination of content validity for a job about which the judge has, at best, only superficial knowledge. Judge Friendly described with approval the approach taken by Judge Weinfeld in *Vulcan* as follows:

> "Instead of burying himself in a question-by-question analysis of Exam 0159 to determine if the test had construct or content validity, the judge noted that it was critical to each of the validation schemes that the examination be carefully prepared with a keen awareness of the need to design questions to test for particular traits or abilities that had been determined to be relevant to the job. As we read his opinion, the judge developed a sort of sliding scale for evaluating the examination, wherein the poorer the quality of the test preparation, the greater must be the showing that the examination was properly job-related, and *vice versa*. This was the point he made in saying that a showing of poor preparation of an examination entails the need of 'the most convincing testi-

10. The EEOC Guidelines state: "Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question." 29 C.F.R. at § 1607.5(a).

mony as to job-relatedness.' The judge's approach makes excellent sense to us. If an examination has been badly prepared, the chance that it will turn out to be job-related is small. *Per contra*, careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A principle of this sort is useful in lessening the burden of judicial examination-reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand. See *Chance, supra*, 458 F.2d at 1173." 490 F.2d at 395–396.

The primary emphasis, therefore, is on the validity of the methods used in creating the examination not on the independent validity of the end product.

Preparation of a content valid examination requires cooperation between subject matter experts who provide content input and psychometric experts who construct an examination using that input. It goes without saying that the competence of the people involved in the process determines the quality of the product. The cooperative effort of these two groups includes several stages: 1) Analysis of the job to isolate the essential knowledge, skills and abilities required by it; 2) determination of the scope of the examination, the method or methods of testing to be employed and the weight to be given different portions of the examination process; 3) formulation of individual items; and 4) establishment of the passing point.

The cornerstone in the construction of a content valid examination is the job analysis. Without such an analysis to single out the critical knowledge, skills and abilities required by the job, their importance relative to each other, and the level of proficiency demanded as to each attribute, a test constructor is aiming in the dark and can only hope to achieve job relatedness by blind luck. As Judge Weinfeld stated in *Vulcan*:

> "There is no dispute between the parties that a thorough knowledge of the job to be tested is necessary in order to construct a content valid examination. Without this knowledge it is impossible to determine whether the content of the examination is sufficiently related to the content of the job to justify its use. The means used to acquire this information is known professionally as a job analysis —really the beginning point. A job analysis is a thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill." 360 F.Supp. at 1274.

The persons charged with the responsibility for 34–944, Siegel and Samuel Taylor, testified that, although an adequate job analysis was performed, it does not exist in documentary form. (Transcript at 362–63, 682–83.) Defendants contend, however, that the existence of such an analysis is demonstrated by various documents which are in evidence, namely, a job audit (DX–E), KS & A[11] statements (PX–8), class specifications (PX–4) and the rule book (DX–O). (Transcript at 362.) They argue further that the term "job analysis" means "a series of operations or understandings, discussions by which you identify what people do and why and what can be tested and what should be tested" (Transcript at 362–63) and as such is a "process [that] cannot really be reduced to something called a job description" (Transcript at 363; see also Transcript at 683). Accordingly, defendants rely on the knowledge of the job, either pre-existing or obtained during the course of the preparation of 34–944, possessed by those who participated in the examination's construction.

The difficulties presented by defendants' approach are manifold. Accepting their argument that a job analysis need

11. "KS&A" is the standard abbreviation for "knowledge, skills and abilities."

not be reduced to writing, it is nonetheless not persuasive that an adequate job analysis existed at some point in the minds of defendants' experts, if, at the present time, they are unable to prove its existence. In fact, the existence of such an analysis has not been proven. The documents relating to the subject which are in evidence do not even approximate a professionally adequate job analysis; the test constructors' knowledge which was not committed to writing is in some instances unproven and in others unimpressive; and the reliance of the test constructors upon various aspects of the purported job analysis is largely unestablished. The logical, and indeed inevitable inference is that no adequate job analysis was performed.

Since the existence of a job analysis is of primary importance in reaching a decision as to job-relatedness, we will comment on defendants' proof on the subject at some length.

Although Samuel Taylor, Chief Personnel Examiner, testified that, in his opinion, the job audit, KS & A statements, class specifications and the employee rule book together constituted a satisfactory job description "that would be an adequate basis for developing the examination" (Transcript at 362), these documents do not satisfy the requirements of a thorough job analysis as they have been developed by the cases. The job audit (DX–E) has such major flaws that it is almost irrelevant to the case; it was prepared for a purpose other than exam preparation, it was outdated at the time the exam was prepared, and it was devoted almost entirely to describing the position of Correction Officer, not Correction Sergeant. The audit was conducted in order to determine whether various jobs in the Correction Officer Series should be upgraded for the Civil Service classification purpose of determining whether compensation for the positions should be increased. (Transcript at 353; PX–7.)[12] While a document prepared independently of the examination process is not *per se* disqualified for consideration in preparing a job analysis, it cannot substitute for an analysis having the specific goal of examination preparation in mind. Furthermore, the job audit was conducted in Spring, 1970 (Transcript at 360), while 34–944 was administered in October, 1972. Siegel, who was responsible for 34–944, testified that the Sergeant job changed within the two years prior to the examination dated. (Transcript at 533, *see also* PX–42, p. 4.) The audit, almost in its entirety, describes the Correction Officer job. Such references as there are to the Sergeant position do not approach the type of depth of analysis which is essential to the preparation of a job-related test. The audit does not indicate the relative importance of the skills and tasks involved in the Sergeant job or the competency required for the various aspects of the position, both of which are essential functions of a job analysis. Finally, the persons who prepared the audit did not participate in the preparation of the exam, nor is their competence to conduct the audit in any way established by the record. It is perhaps not surprising, in view of the limited utility of the audit—and this is perhaps the most critical point to make on the subject—that it was not consulted by the test constructors in formulating specific exam items. (Transcript at 667–68.)

The other documents on which defendants rely fare no better as substitutes for a job analysis. The class specification (PX–4) is a one paragraph description of the position which contains no more information than would be pos-

12. That the goal of the audit is not coextensive and may even be inconsistent with that of a proper job analysis is demonstrated by the fact that, although the audit concluded that the Sergeant position should be reclassified to grade 17 (Transcript at 564; PX–4), the supervision subtest called for questions appropriate to grades 10–14 and the report preparation sub-test questions were geared to an entry level investigative position (PX–8).

sessed by anyone with only a cursory knowledge of the job. It is a useless document for the intended purposes.

The same observation can be made about the KS & A statements (PX-8), which are descriptions of the five examination subtests rather than of the knowledge, skills and abilities demanded by the sergeant job. The "definition of KS & A" which appears for each subtest is a brief paragraph which states, as starkly as possible, the knowledge, skill or ability tested for, without any indication of gradations of complexity, context, methods or anything which would indicate how the knowledge, skill or ability operates in the actualities of the job. In his deposition (a portion of which was read into the record), Siegel stated that "[t]he K, S and A statements are used as guidelines, in effect, in preparation of particular items or of items in general on—in that they represent the —the K, S and A statements represent those relevant portions of the position, let's say, which we wish to test and therefore act as a guide in telling us the types of items to write or select." (Transcript at 665.) This description of the use to which these documents were put is not credible, because the statements simply do not provide sufficient particularity to aid in the construction of specific items or even of clusters of items. They are only guidelines in the most general sense of blocking out the scope of the exam. Accordingly, it is not surprising that, as Siegel admitted, items on the exam were prepared before the KS & A statements. (Transcript at 666.) As a result, the statements are irrelevant to the job analysis, both because they are so lacking in detail as to serve no useful purpose and because they were not relied on. These phenomena are readily explainable by the fact that the KS & A statements were, in fact, the end product of the job analysis "process" rather than a component part of it, or a summary rather than a guideline. As Samuel Taylor stated, in terms which squarely contradict Siegel: "They [the test constructors] didn't rely on it [PX-8], because it didn't exist before they went through their process." (Transcript at 348.)

Finally, the rule book (DX-0) is obviously not a job analysis or a part of a job analysis. The rules themselves are, concededly, important to the job, but what is important to the analysis is how the rules are applied and what depth of knowledge is required, neither of which is indicated by the rule book.

Defendants' reliance on the knowledge of the sergeant job either possessed by the test constructors prior to commencing work on 34-944 or acquired by them during the course of their work on it is also inappropriate. The record does not establish that the persons who worked on the exam, three of whom came from the Department of Corrections and three from Civil Service, possessed the kind of intimate knowledge of the job that would enable them to do without a job analysis, or would make them, as Samuel Taylor claimed, "living job descriptions" (Transcript at 362).

Of the three persons from the Department of Corrections, only one, Hylan Sperbeck, testified. His qualification as a subject matter expert consists of long service in the Department. The respect to which years of experience might normally be entitled is greatly undercut in his case by the fact that the type of assignments which Sperbeck has held are not necessarily conducive to enhancement of his understanding of the sergeant position. Sperbeck became a Correction Officer in 1957, a Sergeant in 1968, a Lieutenant in 1972 and a Captain in 1973. (Transcript at 738.) Since March, 1970, he has been assigned to the Training Academy and, since that time, he has spent only five or six weekends and four consecutive days in active line duty at any of the facilities. (Transcript at 764-65.) The result is that Sperbeck has been engaged in a normal supervisory capacity at a facility only for the two year period from 1968 to 1970, during which he was a Sergeant. Given the changes which have occurred in the job since that time, his experience, although useful, cannot substitute for a professionally acceptable job analysis. The qualifications as subject matter experts of the two other persons from Corrections (other than years of service) are not established by the record.

Siegel and the two other persons from Civil Service had no first-hand knowledge of the Sergeant position, although Siegel claims some familiarity with the job from past experience in preparing exams in the Correction Officer Series. He also testified to visits to Coxsackie and Matteawan, but the importance of these visits should not be overemphasized since the visit to the latter was for a purpose unrelated to 34-944 (in fact, there are no sergeants at Matteawan (Transcript at 541)), while the visit to the former entailed only an hour or two of discussion with Sergeants (Transcript at 546-47), and, in any event, one day at a facility is hardly sufficient to make someone an expert as to the job. It is worthy of note, moreover, that two of the five subtests (40% of the exam) were prepared solely by Civil Service personnel, other than Siegel, without any input from the subject matter "experts" from Corrections. (Transcript at 367.)

Accordingly, the record does not establish that the knowledge and qualifications possessed by the test constructors were such that they can simply be deemed to have had in their heads a job analysis sufficient to satisfy legal and professional requirements. Indeed, a contrary inference is warranted by the record.

We conclude, therefore, that defendants have failed to prove that they performed an adequate job analysis. The same lack of professionalism which characterized the process by which defendants conducted their job analysis also characterized the manner in which they determined the type of examination, its scope, the weight of the subtests and the passing score. All of these matters seem to have been decided almost as a matter of course by referring to and following the practices established by prior exams.

The record indicates that the promotional examination for the Sergeant position has been for many years a written, multiple choice examination. This was true at least as to the examinations given in 1964, 1968, 1970 and 1972. (PX-43.) [13] When asked how the decision was reached that the knowledge, skills and abilities needed for the position of Correction Sergeant could best be tested by a written examination, Siegel stated in his deposition:

> "[I]t's to a large extent, I suppose, a decision of history, let's say, where previously selections for this position have been made by written examination and I would assume that the request that we received from the Department of Correctional Services for this examination also indicated request for a written examination." (Transcript at 697.)

Somewhat more thought seems to have gone into the decision not to use performance ratings as any part of the promotional process, although such use is permitted by state law (Civil Service Law § 52(2)). (Transcript at 671-72.) Siegel and Taylor stated that they considered using supervisory evaluations, but decided not to because of the inadequacy of the existing rating scale. (Transcript 381-82, 672.)

Like the decision to use a written examination and to exclude consideration of supervisory evaluations, determination of the scope and organization of 34-944 seems to have followed the pattern of earlier examinations. Of course,

13. PX-43 describes the scope of prior examinations given in 1964, 1968 and 1972. However, since Siegel testified that an examination was given in 1970 (Transcript at 531-33) and since 34-944 was given in 1972, we assume that 34-007, the last examination to precede 34-944, was in fact given in 1970 and not in 1972.

if these set a model for good construction and job-relatedness, that would be a good argument not to depart from their mold. However, while there is evidence in the record of the discriminatory impact of the earlier tests, there is no evidence as to their job-relatedness. Furthermore, even an exam once job-related may become outdated as jobs change. At the very least, it is fair to say that the slavish imitation of earlier examinations which we find in this case indicates an alarming lack of independent thought about how to assure that 34-944 was job-related.

The scope of 34-944 was identical to that of the 1964, 1968 and 1970 examinations, except that some of the earlier examinations included a section on interpretation of written materials instead of or as well as the section on preparation of written reports found in 34-944. (Transcript at 530-32; PX-43.) The similarity is not accidental; Siegel and Samuel Taylor both testified that they relied heavily on prior scope statements in defining the scope of 34-944. (Transcript at 530-32, 659.)

Furthermore, the organization of 34-944 is virtually identical to that of its predecessors. Both 34-944 and the 1964 exam contain five subtests of 15 items, while the 1968 and 1970 tests consist of 90 items, including four subtests of 15 items and one of 30 items. (PX-43.) When asked why each subtest on 34-944 was weighted equally with 15 items of the same value, Siegel replied: "By using a set number of items in each sub test, we are able to more routinely do certain types of analyses on this material that gives us additional information of how the items are working, and things like that." (Transcript at 566.) That this was a routine decision based solely or primarily on administrative convenience is further evidenced by his statement that "in our department we work on the basis of 15 questions per sub test and we work in constructing a test in sub test units." (Transcript at 700.) This practice, however, is not necessarily compatible with the notion that different parts of the examination must be weighted as nearly as possible to reflect the relative importance of the attributes tested for to the job as a whole. This lack of individualization in the framing of 34-944 is again demonstrated by the fact that 60% of the items on the Sergeant exam were also found on the Lieutenant exam given at the same time. (Transcript at 534-35.)

Finally, the decision to establish the passing score of 70% subordinates the goal of job-relatedness to that of administrative convenience. Samuel Taylor and Siegel stated that they set the passing score at the maximum permitted by law (Transcript at 524), because that score would still permit a sufficiently large group of passing candidates to satisfy the employment needs of the Department. (Transcript at 380, 524-27.) As a result, Taylor admitted that "its function is really more for the purpose of regulating the number of people who will then be in line to take the job than it is to declare that a man is qualified or not." (Transcript at 341.) Although this approach is not without justifying logic, it departs from the requirement, imposed by law, that such decisions be made so as to further the paramount goal of job-relatedness. Properly employed, the passing score should serve to separate those who are qualified for the job from those who are not. (Transcript at 880-81.) Admittedly, it did not serve that purpose in this case.

The factors described above lead inescapably to the conclusion that the procedures employed in constructing 34-944 do not conform to professionally acceptable and legally required standards. This determination may be enough to justify a finding that the examination is not job-related, without regard to the quality of the examination. *See* Fowler v. Schwarzwalder, 351 F.Supp. 721, 725 (D.Minn.1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351, 1355 (N.D.Cal.1972). As Judge Weinfeld stated in *Vulcan*: "It should be self-evident that content validity greatly depends upon the adequacy of the manner in which the examination is prepared." 360 F.Supp. at 1275. At a minimum, "under these circumstances only the most convincing testimony as to job-relatedness could succeed in discharging [defendants'] burden." *Id.* at 1276.

This burden has not been met. To the contrary, positive evidence of job-relatedness is conspicuous by its absence. Defendants' expert, Dr. Erwin Taylor, specifically refused to testify that 34-944 was job-related. (Transcript at 809-11.) He was not willing to go beyond his statement that "if these procedures were in effect followed, they would constitute the steps necessary but not necessarily sufficient to the development of a series of job related tests." (Transcript at 809.) Plaintiffs' expert, Dr. Richard Barrett, a leading industrial psychologist and expert in the field, while declining to state positively that 34-944 was not job-related, did testify that the exam had not been demonstrated to be job-related (Transcript at 893-94) and indicated that he had "substantial doubts as to whether the test is in fact valid" (Transcript at 894-95).

Taking to heart Judge Friendly's implied caveat against "burying [ourselves] in a question-by-question analysis" of the exam (*Vulcan*, 490 F.2d at 395), we merely note in passing some of the imperfections indicated by the record. Witnesses for both sides agreed that certain items in the laws, rules and regulations subtest involve guidelines that a Sergeant would have no need to apply. (Transcript at 128-30, 132-33, 553, 774.) As to all the subtests, Dr. Barrett testified as to item defects, inconsistencies, and irrelevancies with regard to numerous questions. (Transcript at 903-22.) It is unnecessary to agree with his comments as to each item to find that the record supports his conclusion that 34-944 is not a professionally adequate examination. (Transcript at 922-23.)

More serious perhaps than specific item flaws is the fact that, regardless whether 34-944 adequately tests the attributes it is intended to measure, it fails to examine a number of traits, skills and abilities which witnesses for both sides singled out as important to the Sergeant job. Among these are leadership, understanding of inmate resocialization, ability to empathize with persons from different backgrounds, and ability to cope with crisis situations. (Transcript at 63-64, 117, 308, 702-703.) We conclude, as did Judge Newman in *Guardians*, that:

> "Even if the exam need not be comprehensive as to content or constructs, the evidence does not indicate whether the few areas of knowledge and the few traits measured are the ones that will identify suitable candidates for the job . . . . An exam of this sort, which does not attempt to be comprehensive in testing for content or constructs, employs a sampling approach. Such an exam might, in some circumstances, be shown to meet the standard of job relatedness. But the evidence does not establish the representativeness of the knowledge or traits sampled by the exam used here." 354 F.Supp. at 792.

Given the unwillingness of both experts to state positively that 34-944 is or is not job-related, it would be foolhardy on our part to hazard such an opinion. It is, of course, barely possible that the exam is job-related; "[d]efendants' burden, however, is not to establish possibilities but to demonstrate strong probabilities" (*Vulcan*, 360 F.Supp. at 1276 (footnote omitted)). We can say with certainty, and we are required to do no more, that the probabilities in this case run heavily against defendants. Accordingly, they have failed to meet the burden which the law imposes on them.

III. REMEDY.

We turn, therefore, to the question of relief. Plaintiffs seek 1) a permanent injunction against basing permanent ap-

pointments to the position of Correction Sergeant on the results of 34-944; 2) a mandatory injunction obliging defendants to develop a valid selection process for that position; and 3) an injunction requiring defendants to make interim and regular appointments of class members. They also seek a class action determination and an award of costs, including attorneys' fees.

Taking the class action question first, we find that plaintiffs have demonstrated the existence of a class satisfying the requirements of Rule 23 composed of all Black and Hispanic Correction Officers or provisional Correction Sergeants who failed 34-944 or who passed but ranked too low to be appointed.[14] The class is clearly too numerous to permit joinder: a total of 119 minority candidates, 103 Blacks and 16 Hispanics, took 34-944 and of these only 9 passed and only 2 (both Black) received a score of 57 or above giving them a chance at appointment. Accordingly, the class numbers 117 persons which is more than sufficient to satisfy the demands of Rule 23(a)(1). Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972). Whether examination 34-944 discriminated against minority candidates is the question of law common to the class and plaintiffs' claims are perfectly typical of the claims of the class.[15] Rule 23(a)(2) and (3). The representative parties have amply demonstrated their ability to protect fairly and adequately the interests of the class by conducting the litigation to its present successful conclusion. Rule 23(a)(4). Finally, the defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2). Accordingly, it is proper that the case be treated as a class action.

We turn to the substantive relief requested by plaintiffs. Plaintiffs seek and are entitled to declaratory and injunctive relief against the use of 34-944 and the eligible list which was promulgated pursuant to it as a basis for appointments to the position of Correction Sergeant. Accordingly, examination 34-944 is declared unconstitutional and defendants are enjoined from making appointments based on its results. Furthermore, defendants are enjoined from terminating the provisional appointments of the named plaintiffs and those members of the class who are provisional Correction Sergeants solely because of their inability to pass 34-944.

The invalidation of 34-944 clearly authorizes the court to grant appropriate affirmative relief, including mandating the creation of a new selection process to conform with the requirements of the Fourteenth Amendment and ordering the promotion of members of the plaintiff class in a ratio designed to correct the effect of defendants' unconstitutional employment practices. As the Supreme Court stated in Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965):

> "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *See also, Guardians*, 482 F.2d at 1340.

However, we believe it is appropriate to defer decision on the extent of affirmative relief to enable defendants to respond to the specific requests made by plaintiffs. Since, pursuant to court order, the post-trial memoranda in this case were submitted simultaneously, defendants have not as yet had the opportunity to address themselves to the recommendations contained in plaintiffs' brief and proposed order. We refer, in particular, to plaintiffs' suggestions that 1) the new selection procedure be required to conform with the EEOC Guidelines; 2) class members who are presently provisional Correction Sergeants[16] be permanently appointed to that position; 3) an interim permanent appointment procedure be instituted which would provide for the promotion of minority persons in a ratio of at least one to each three White promotions; and 4) this promotion ratio be continued even after a valid selection procedure has been devised. Accordingly, defendants are instructed to submit an answering memorandum on these issues within ten tays of the filing of this Opinion, plaintiffs to have the opportunity to reply within one week thereafter.

Finally, plaintiffs request an award of reasonable attorneys' fees. Defendants oppose on two grounds: 1) As a general rule, successful litigants cannot recover attorneys' fees from the losing party and plaintiffs have not shown themselves to fall into any exception to this rule; and 2) an award of attorneys' fees is barred by the doctrine of sovereign immunity and the Eleventh Amendment.

Defendants' first argument, while correctly stating the general approach, overlooks a growing line of cases, discussed below, which establishes an exception in favor of plaintiffs who act as private attorneys general and who litigate not only for their own benefit but also to vindicate the rights of others similarly situated and the interest of the public generally:

> "The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney-general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D.Cal.1972).

In such cases, the protection of rights conferred both by the Constitution and by Congressional enactment requires that the normal rule be superseded. This exception to the general rule of not allowing attorney's fees derives from Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), a class action under Title II of the Civil Rights Act of 1964, in which the Supreme Court stated that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402, 88 S.Ct. at 966; *see also* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-397, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970).

The fact that this suit was not brought under the Civil Rights Act of 1964, which specifically provides for the award of attorneys' fees, but rather under 42 U.S.C. §§ 1981 and 1983, which do not so provide, does not mandate a different result. In Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971), the Court of Appeals relying on *Piggie Park* held that "attorney's fees are part of the effective remedy a court should fashion to carry out the congressional policy embodied in [42 U.S.C.] Section 1982." *Id.* at 144. Indeed, the

14. Plaintiffs originally sought to represent as well persons who were deterred from taking the examination by defendants' discriminatory employment practices. Since they introduced no evidence as to persons who might have been deterred, plaintiffs "do not now insist upon their inclusion in the class" (Post Trial Memorandum at 64), and we decline to include them.

15. Defendants claim that the named plaintiffs cannot represent persons who passed the examination but ranked too low to be appointed because both named plaintiffs failed 34-944. However, plaintiffs' interests and those of persons who passed but whose low rank prevents their appointment are identical, and we reject defendants' contention that the claims of the former are not representative of those of the latter.

16. Plaintiffs also request the permanent appointment of Henry Liburd, a member of the class who was not provisionally appointed to the Sergeant position, because they contend that the record establishes his qualifications for permanent appointment.

fact that subsequent Congressional legislation in furtherance of the same objective provided for the award of attorneys' fees was considered by the *Lee* court to be relevant to a determination of appropriate remedies under the earlier Civil Rights Acts, which do not enact a panoply of specific remedies:

> "[I]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. Courts work interstitially in an area such as this." *Id.* at 146.

We note, in this context, that Title VII of the 1964 Act, which provides a parallel route to the one chosen by plaintiffs here, allows for the award of attorneys' fees. 42 U.S.C. § 2000e–5(k). Furthermore, the absence of specific remedies in the earlier Civil Rights Acts authorizes the court to exercise its broad equitable power to include in the relief any remedy which furthers the vindication of Constitutional and Congressional policy, whereas if the statutes detailed the types of relief which they authorized and omitted attorneys' fees they would bar by inference such an award. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967); Harper v. Mayor and City Council, 359 F.Supp. 1187, 1217–1218 (D.Md.1973).

Because the issue is important and novel, at least in this Circuit, we list at greater length than might otherwise be required some of the recent decisions which have granted attorneys' fees in suits under §§ 1981–1983 on the "private attorney general" theory, despite the absence of statutory authorization and without relying on a showing of bad faith or unreasonable obduracy by defendants. See Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Homes Sites Corp., 444 F.2d 143, 144–148 (5th Cir. 1971); Harper v. Mayor, 359 F.Supp. 1187, 1217–1218 (D.Md.1973); Wyatt v. Stickney, 344 F.Supp. 387, 408–409 (M.D.Ala.1972); Sims v. Amos, 340 F.Supp. 691, 694–695 (M.D.Ala.) (three judge court), aff'd, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972); NAACP v. Allen, 340 F. Supp. 703, 708–710 (M.D.Ala.1972); Bradley v. School Board, 53 F.R.D. 28, 41–42 (E.D.Va.1971); Morrow v. Crisler, 4 E.P.D. ¶ 7584 (S.D.Miss.1971). *See also* Brewer v. School Board, 456 F. 2d 943, 951–952 (4th Cir. 1972); La Raza Unida v. Volpe, 57 F.R.D. 94, 98–102 (N.D.Cal.1972). We note particularly that Cooper v. Allen, Harper v. Mayor, NAACP v. Allen and Morrow v. Crisler are cases which, like the suit here, were brought under 42 U.S.C. §§ 1981 and 1983 to vindicate the right to equal employment opportunities in the public sphere. We see no relevant distinction between them and the case at hand.

Defendants' second contention, that the award of attorneys' fees is barred by the Eleventh Amendment and the doctrine of sovereign immunity,[17] has been rejected in the recent case Gates v. Collier, 489 F.2d 298 (5th Cir., 1973). The court there affirmed an award of attorneys' fees, stating:

> "This Court has said that in such a suit as this the award of attorney's fees is not an award of damages against the State, even though funds for payment of the costs may come from the state appropriations.
>
> * * * * * *
>
> "Although the trial court had the power to assess attorney's fees and expenses against the individual defendants found to have engaged in the unconstitutional conduct, we think it does not vitiate the award because the trial court prescribed that this part of the costs were to be payable 'from funds which the Mississippi Legislature, at its 1973 Session, may appropriate for the operation of the Mississippi State Penitentiary,' and were not to be 'the personal, or individual, liability of the varied defendants or any of them.'" Id. at 302 (footnote omitted).

17. No Eleventh Amendment or sovereign immunity problems would arise from an award of attorneys' fees against the individual defendants. Although the record might well justify such an award, it is nonetheless not within our power since the individual defendants were never properly brought before the court. Kirkland v. New York State Department of Correctional Services, 358 F.Supp. 1349, 1350, n. 1. (S.D.N.Y.1973). Accordingly, attorneys' fees can only be awarded against the two defendant state agencies.

The issue has also arisen and been resolved adversely to defendants' position here in Sims v. Amos, 340 F.Supp. 691 (M.D.Ala.) (three judge court), aff'd, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972), and La Raza Unida v. Volpe, 57 F.R.D. 94, 101, n. 11 (N.D.Cal.1972).

Plaintiffs ask the court to determine at this time the size of the award and have submitted affidavits upon which to base the determination. To accede to their request without providing defendants the opportunity of bringing to our attention facts relevant to determining the amount in question would be improper in view of the recent decision of the Court of Appeals for this Circuit in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir., 1974). Accordingly, defendants are instructed to include in the memorandum discussed above any facts which they wish the court to bear in mind in determining the amount of attorneys' fees to which plaintiffs are entitled.

To sum up: Examination 34–944 is declared unconstitutional and is set aside. Defendants are enjoined from making permanent appointments to the position of Correction Sergeant from the eligible list which is based on its results and from terminating the provisional appointments to that position of plaintiff class members solely because of their failure to pass the examination. Defendants are instructed to submit a memorandum on the subjects delineated above within ten days of the filing of this Opinion, plaintiffs to reply within one week thereafter. Plaintiffs are awarded reasonable costs, including attorneys' fees, in an amount to be determined after further documentation by the parties.

It is so ordered.

Decree of District Court

[CAPTION OMITTED]

Filed: July 31, 1974

LASKER, D.J.: This action having been tried to the Court without a jury, and the Court having made findings of fact and conclusions of law by Opinion dated April 1, 1974 [7 EPD ¶9268] (374 F. Supp. 1361), declaring Examination No. 34-944, prepared by the Civil Service Commission of the State of New York and administered by the Department of Corrections of the State, for promotion to the grade of Correction Sergeant to be unconstitutional, and setting it aside; and the original parties hereto and the intervenors having filed memoranda in relation to the relief which should be afforded in accordance with the findings and conclusions of the Court, and the Court having thereafter conferred with counsel as to the terms of such relief, it is Ordered, Adjudged and Decreed:

1. Examination No. 34-944 is declared invalid as violating the Constitution of the United States.

2. The defendants New York State Department of Correctional Services and New York State Department of Civil Services, and the named defendants Oswald, Poston, Stockmeister, and Scelsi, and their agents, employees, and successors in office are permanently enjoined from (a) making permanent or provisional appointments to the position of Correction Sergeant (Male) in the New York State Department of Corrections based upon the results of Examination No. 34-944 or any eligible list promulgated pursuant to that examination; and (b) administering or promulgating eligible lists based upon, or in any way acting upon the results of, Examination No. 34-944 for the position of Correction Sergeant (Male).

3. The defendants, their agents, employees, and successors in office, are mandatorily enjoined to develop a lawful non-discriminatory selection procedure for the position of Correction Sergeant (Male). In so doing, they shall adhere to the following general guidelines:

(a) The new selection procedure shall be developed within the shortest practicable period.

(b) The new selection procedure shall be developed and, before usage for promotional purposes, validated in accordance with the EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607.1 (1970), as those Guidelines are or as later revised.

(c) All validation studies pursuant to this decree shall be performed by means of empirical, criterion-related validation techniques insofar as feasible.

(d) The selection procedure to be developed may include a written examination, and may also include other selection instruments or procedures.

4. During the perind required for the development of a lawful, non-discriminatory selection procedure for permanent appointments to the position of Correction Sergeant (Male), the Court will entertain requests by defendants or their successors in office for permission to make such appointments under an interim procedure subject to the following provisions:

(a) Any such request shall set forth a statement of the circumstances which render such appointments necessary or desirable.

(b) The request shall specify the number of appointments to be made, and the desired effective date(s) of such appointments.

(c) The request shall set forth the nature of the interim procedure to be relied upon to select persons for promotion to Correction Sergeant (Male), and the reasons for employing that particular procedure, and the reasons assuring that the procedure will be based on merit and fitness and will be non-discriminatory in effect.

(d) The request shall pledge, and the subsequent appointments shall reflect, that members of the plaintiff class shall receive at least one such promotion by the interim procedure for each three such promotions received by persons not members of the class defined herein. This numerical requirement shall be annulled at such time as the combined percentage of Blacks and Hispanics in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Blacks and Hispanics in the ranks of Correction Officers (Male).

(e) Copies of requests shall be submitted to counsel for plaintiffs or their designee when submitted to the Court, and plaintiffs' comments thereon, made within no more than ten days or such shorter period as the Court may specify upon an appropriate showing of urgency by the defendants, will be considered by the Court.

5. Upon completion of the development of the revised selection procedures and subject to the Court's approval thereof, the defendants, their agents, employees and successors in office are enjoined from failing to appoint as permanent Correction Sergeants (Male) pursuant to the new

procedures at least one Black or Hispanic employee for each three white employees so appointed, until the combined percentage of Black and Hispanic persons in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Black and Hispanic persons in the ranks of Correction Officers (Male).

6. The parties are directed to confer with a view to proposing jointly to the Court a detailed procedure for the execution of the steps set forth in this decree, if agreement is possible. The parties shall submit their joint or, if necessary, separate proposals as to these steps within thirty (30) days after the date of this decree. The joint or separate proposals shall provide for submission of any proposed selection procedure to the plaintiffs for review and to the Court for approval prior to the initiation of the selection procedure for promotional purposes.

7. The Court retains jurisdiction for such period as is necessary to supervise this decree and further proceedings thereunder, and to determine the reasonable value of plaintiffs' attorneys' services.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 445, 499—September Term, 1974.

(Argued April 21, 1975 Decided August 6, 1975.)

Docket Nos. 74-2116, 74-2258

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants-Appellants,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Appellants.

Before:

HAYS, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal from an order and decree of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge,* invalidating as unconstitutionally discriminatory a Civil Service examination for sergeant in the New York State Department of Correctional Services.

Affirmed in part and reversed in part.

JUDITH A. GORDON, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Asst. Atty. Gen., Stanley L. Kantor, Asst. Atty. General, New York, N. Y., of Counsel), *for Defendants-Appellants.*

RICHARD ROWLEY, Esq., Albany, N. Y. (Sneeringer & Rowley, Albany, N. Y., of Counsel), *for Intervenors-Appellants.*

DEBORAH M. GREENBERG, Attorney, New York, N. Y. (Jack Greenberg, Esq. and Morris J. Baller, Esq., New York, N. Y., of Counsel), *for Plaintiffs-Appellees.*

ARNOLD FORSTER, Esq., New York, N. Y. (Joy Meyers, Attorney and Justin J. Finger, Esq., New York, N. Y., of Counsel), *for amicus curiae, Anti-Defamation League of B'nai B'rith.*

VAN GRAAFEILAND, *Circuit Judge:*

On October 14, 1972, the New York State Department of Civil Service offered examination 34-944 for promotion to the position of correction sergeant in the New York State

Department of Correctional Services. One thousand, two hundred sixty-three white correctional officers took this examination, and three hundred eighty-nine, or 30.8%, received a passing score. Of the one hundred four Blacks tested, eight, or 7.7% passed; of the sixteen Hispanics, two, or 12.5% passed. Thus was this litigation born.

On April 10, 1973, Edward Kirkland and Nathaniel Hayes, two Black officers who failed, joined with the Brotherhood of New York State Correction Officers, Inc., in instituting this civil rights class action[1] on behalf of their similarly situated fellow officers, seeking to enjoin any promotions to sergeant based on the results of the examination.

The case was tried before Judge Lasker in July of 1973, and this appeal is taken from his order and decree. Basically, the order provided as follows:

1. It declared examination 34-944 invalid as unconstitutionally discriminatory and enjoined defendants from making any appointments to sergeant based on the results thereof.

2. It mandatorily enjoined defendants to develop a lawful, non-discriminatory selection procedure for the position of sergeant, requiring that it be validated in accordance with the E.E.O.C.[2] Guidelines on Employment Selection Procedures and that all validation studies be performed by means of empirical, criterion-related validation techniques insofar as feasible. It also required that the proposed selection procedure

1 Although the coverage of Title VII was enlarged in 1972 by the amendment of 42 U.S.C. § 2000e(a) to include governments, governmental agencies and political subdivisions, this action was brought under 42 U.S.C. §§ 1981, 1983.

2 Equal Employment Opportunity Commission.

be submitted to the plaintiffs for review and to the court for approval prior to its adoption.

3. It authorized defendants to request the court's permission for the making of interim appointments, with the provision that members of the plaintiff class receive at least one out of every four such promotions until the combined percentage of Black and Hispanic sergeants was equal to the combined percentage of Black and Hispanic correction officers.

4. It required that, following the development and court approval of revised selection procedures, defendants continue to promote at least one Black or Hispanic employee for each three white employees promoted until the combined percentage of Black and Hispanic sergeants was equal to the combined percentage of Black and Hispanic correction officers.

5. It awarded attorney's fees to plaintiffs as part of their costs, retaining jurisdiction in the court to determine the amount thereof.

Defendants have appealed from this order, contending primarily that examination 34-944 was job-related and therefore not unconstitutionally discriminatory; that the court erred in requiring future examinations be criterion-validated; that the imposition of promotion quotas was unjustified and constituted reverse discrimination; and that the award of attorney's fees was improper.

By order to show cause dated April 23, 1974, Albert M. Ribeiro and Henry L. Coons, correction officers who had taken and passed examination 34-944, sought leave to intervene as parties defendant on behalf of themselves and a class of similarly situated correction officers, alleging that they were indispensable parties, since the relief sought

by plaintiffs would deprive them of their personal and property rights without due process of law. This motion was granted, with the proviso that intervenors could not litigate any matters which they might have litigated had they been parties from the outset. Intervention was also limited to the petitioners as individuals and not as representatives of a class.

Intervenors also appeal from the final order and decree, urging as additional error that they should have been joined at the outset as indispensable parties. Since this latter contention involves the litigation at its inception, we will address ourselves to it first.

Dismissal for Non-Joinder

Intervenors' claim of indispensability is grounded upon the provisions of the New York Civil Service Law. The office of correction sergeant is in the competitive class under such law.[3] Article 5, Section 6, of the New York Constitution requires that appointments and promotions in the Civil Service "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive".

The Civil Service Law, following the mandate of the Constitution, requires the taking of competitive examinations and the appointment and promotion to covered positions from eligible lists promulgated from the results of such examinations.[4] Appointment or promotion is generally required to be made from one of the three persons standing highest on the eligible list.[5] When there is no appropriate eligible list available, provisional appoint-

3 N. Y. Civil Service Law § 44 (McKinney 1972).

4 N. Y. Civil Service Law §§ 52, 61 (McKinney 1972).

5 N. Y. Civil Service Law § 61 (McKinney 1972).

ments or promotions are authorized, pending the creation of a new list;[6] and provisional appointees secure certain benefits which may be applied against future permanent appointments.[7]

The eligible list from the examination preceding 34-944 became exhausted in the Spring of 1972, and intervenors, together with some members of plaintiff class, received provisional appointments to correction sergeant. Intervenors were among the ninety persons who had passing scores on examination 34-944, and it was expected that all ninety would receive permanent appointments as sergeant. Such appointments were prohibited, initially by the District Court's temporary restraining order and finally by the order and decree appealed from.

That the intervenors were adversely affected by such orders can hardly be gainsaid.[8] However, this in itself is not determinative of their right to be joined as indispensable parties. When litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties.[9]

It may be that because of the "reverse discrimination" aspects of this case which will be discussed hereafter, intervention with the right to participate in the trial would have been appropriate if timely request therefor was

6 N. Y. Civil Service Law § 65 (McKinney 1972).

7 N. Y. Civil Service Law § 52 (McKinney 1972).

8 *Castro* v. *Beecher*, 459 F.2d 725, 736 (1st Cir. 1972).

9 *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 366 (1940); *National Resources Defense Council, Inc.* v. *Tennessee Valley Authority*, 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972); *Sansom Committee* v. *Lynn*, 366 F. Supp. 1271 (E.D. Pa. 1973).

made.[10] However, that question is not before us. We hold that intervenors' argument that the complaint should have been dismissed because they were not joined as indispensable parties could not be made for the first time one year after the trial had been completed. At that late date, the test of "equity and good conscience" foreclosed any such rights which intervenors might possibly have had.[11]

That intervenors were aware of the litigation at its inception was clearly shown by the fact that the District Court's preliminary injunction prohibited their appointments. The orderly processes of justice do not permit that, with such knowledge, they may stand idly by until after an adverse decision is rendered.[12]

The Constitutionality of the Examination

Proof in employment discrimination cases proceeds from effect to cause. Plaintiffs establish the racially disparate consequences of defendants' employment practices, and defendants must then justify such consequences on constitutionally acceptable grounds.[13]

Plaintiffs herein contend that examination 34-944 had a disproportionate impact upon minority correction officers, and that defendants must therefore establish that the subject matter of the test bore a meaningful relationship to the duties of the office for which the test was given, *i.e.*, that it was "job-related".[14]

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10 *See, e.g., Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973).

11 *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968).

12 *Rios* v. *Steamfitters Local 638*, —— F.2d —— (2d Cir. June 24, 1975), Slip op. 4351, 4358 n.3.

13 *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

14 *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973).

The figures relied upon by plaintiffs are recited above; 30.8% of the Whites who took examination 34-944 passed, as contrasted with 7.7% of the Blacks and 12.5% of the Hispanics. Defendants, while not disputing the accuracy of these figures, contend that most of the racial disparity occurred at Ossining Prison which employs the largest group of minority correction officers and urge that any attack upon the examination should be limited to the employees at that institution. Defendants say that either there was no disparity at all at the other correction facilities or else that so few officers were tested at such facilities that no meaningful conclusions could be reached from the test results.

This argument completely overlooks the identity of job classifications in the State's penal institutions, the Statewide scope of examination coverage, and the mobility of employees throughout the correctional system. It also ignores the fact that the examination grades for minorities were uniformly lower at all of the State's facilities.

The District Court's refusal to fractionalize the examination by varying its application among the correctional facilities was therefore not clearly erroneous.

The District Court was likewise not convinced by defendants' argument that the results of the five sub-tests comprising examination 34-944 did not show a consistent racial disparity, particularly when broken down among the different correctional facilities. Since passing grades and promotion were dependent upon the cumulative results of the five sub-tests, we too see little relevance in this proof on the issue of whether or not the examination as a whole had an unconstitutional discriminatory impact.[15]

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15 *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Service Comm'n*, 360 F. Supp. 1265, 1272 (S.D.N.Y. 1973), *aff'd*, 490 F.2d 387 (2d Cir. 1973). *See* note 13, *supra*.

In *Vulcan Society of the New York City Fire Department, Inc.* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973), we stated that racially disproportionate impact need not be proven with complete mathematical certainty. Within the broad outlines of that rule, the District Court's holding that examination 34-944 had such disproportionate impact was not clearly erroneous. Defendants were therefore properly put to their proof to establish the job-relatedness of the examination under attack.

The District Judge's decision that defendants had not met the heavy burden thus imposed upon them was based largely upon his conclusion that the procedures employed in constructing examination 34-944 did not conform to professionally acceptable and legally required standards. Specifically, the District Judge held that the defendants had not performed an adequate job analysis and had too routinely followed the pattern of past practices. This approach was approved by us in *Vulcan, supra,* where we said that it was unnecessary for the trial judge to bury himself in a question-by-question analysis of the test.

Of course, the trial judge could not confine himself to an examination of the process of preparation while completely ignoring the merit of the result. However, since insufficient spadework usually results in a poor garden, evidence of unsatisfactory preparation imposed upon the defendants a heavier burden of demonstrating that they had created a satisfactory job-related examination.

The District Judge, without going into great detail, pointed out that certain items on the test involved guidelines that a correction sergeant would have no need to apply. He showed that the five sub-tests and their component parts were not weighted to reflect the relative importance of the job-related attributes being tested. He considered the expert testimony submitted by both sides

and stressed the fact that neither expert would characterize the examination as job-related.

We hold that Judge Lasker's finding that defendants had failed to carry their heavy burden of establishing the job-relatedness of examination 34-944 was not clearly erroneous, and we move to the question of the relief granted.

New Testing Procedures

Having declared examination 34-944 unconstitutionally invalid, the District Judge ordered the development of a "lawful non-discriminatory selection procedure". He also required that such procedure be validated in accordance with the E.E.O.C. Guidelines on Employment Selection Procedures[16] and that such validations be performed by means of empirical criterion-related validation techniques insofar as feasible.

In *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), and again in *Vulcan, supra,* we described the several techniques for proving the validity of testing procedures which are professionally designated "empirical", "construct" and "content", and we see no need for further description in this opinion. In *Vulcan,* we went a step further. We said:

> "The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.'"

16 29 C.F.R. §§ 1607.1 *et seq.* (1970).

However, since our decision in *Vulcan*, the Supreme Court in *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (U.S. June 25, 1975), has strongly endorsed the procedures outlined in the E.E.O.C. Guidelines which provide that evidence of content or construct validity may be appropriate "where criterion-related validity is not feasible".[17] While *Albemarle* is distinguishable from the instant case in that it is a Title VII action involving a private industrial employer, we think the District Court's similar preference for the E.E.O.C. Guidelines was not clearly erroneous.[18]

We do not construe the order of the District Court as going beyond the provisions of the Guidelines by requiring empirical validation regardless of feasibility. It seems clear that the problems involved in civil service testing are substantially different from those which confront a private employer who tests on a limited and non-competitive basis. These problems will, we are sure, be considered by the District Court should a dispute hereafter arise as to whether appellants' testing procedures have been empirically validated "insofar as feasible".

The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage.[19] If the District Judge is seeking professional assistance from plaintiffs' expert, his

17 29 C.F.R. § 1607.5(a) (1970).

18 *Cf. Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

19 *Cf. Matter of Fitzgerald* v. *Conway*, 275 App. Div. 205 (3d Dep't 1949); *Matter of Belmont* v. *Kaplan*, 16 A.D. *aff'd* 13 N.Y. 2d 998 (1963) *(mem)*.

order should so provide; and proper steps should be taken to insure confidentiality.

The Imposition of Quotas

One of the most controversial areas in our continuing search for equal employment opportunity is the use of judicially imposed employment quotas.[20] The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.

The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited.[21] Commentators merely echo the judiciary in their disapproval of the "discrimination inherent in a quota system.[22]

Our court has approached the use of quotas in a limited and "gingerly" fashion. In *United States* v. *Wood Lathers, Local 46*, 471 F.2d 408 (2d Cir.) *cert. denied*, 412 U.S. 939 (1973), we approved an order based upon a consent decree which directed a union to issue a quota of work permits to minority workers. In *Bridgeport, supra*, we approved the use of hiring quotas for the Bridgeport Police Department. In *Vulcan, supra*, we affirmed an interim order for quota hiring of New York City firemen

20 Note, Constitutionality of Remedial Minority Preferences in Employment, 56 Minn. L. Rev. 842 (1972). *See, e.g., Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974), *cert. denied* 417 U.S. 965 (1974).

21 Blumenrosen, Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675 (1974).

22 *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950); *see also* dissenting opinion of Mr. Justice Douglas in *De Funis* v. *Odegaard*, 416 U.S. 312 (1974), dissenting opinion of Judge Hays in *Rios* v. *Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974), and concurring opinion of Judge Feinberg in *Patterson* v. *Newspaper Deliverers Union*, 514 F.2d 767 (2d Cir. 1975).

"only because no other method was available for affording appropriate relief without impairing essential city services". 490 F.2d at 398. *Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) imposed a specific racial membership goal upon a union. In *Patterson* v. *Newspaper Delivers Union*, 514 F.2d 767 (2d Cir. 1975), we approved a settlement which also involved union membership with an imposed quota system for the union's group classification system. In each of these cases, there was a clear-cut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of identifiable reverse discrimination. In the instant case, there is insufficient proof of the former and substantial evidence of the latter.

This is a class action brought on behalf of one hundred seventeen persons who took and failed examination 39-944 or who passed but ranked too low to be appointed. The class was so designated by the District Court which found that the question of whether examination 34-944 discriminated against minority candidates was the question of law common to the class. The existence of such common question of law or fact was, of course, a prerequisite to the maintenance of a class action.[23]

At the outset of the trial, the District Judge indicated his desire to decide the case on the basis of 34-944 alone, and it is clear that the trial proceeded substantially on that basis. Some incomplete, and therefore unreliable, data were submitted with regard to the previous examination given in 1970, but plaintiffs concede, as they must, that there are no data in the record with respect to pre-1970 tests. There was proof of some present racial imbalance among supervisory correction personnel, but this had little probative value without statistical background

23 Fed. R. Civ. Pro. 23(a).

data concerning the eligible correction officer labor pool from which minority supervisors could have been drawn. The testimony is undisputed that the duties of a correction sergeant have changed substantially over the years so that no retroactive inference concerning job-relatedness could be made as a result of examination 34-944 which was evaluated in relation to the job as it then existed. Finally, although this is not dispositive of the matter, there is no claim that defendants at any time acted without the utmost good faith or with intention to discriminate.

A comparison of respondent's proof with that considered by then District Judge Mansfield in *Chance* v. *Board of Examiners*, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972) is illuminating. Judge Mansfield's opinion shows that he reviewed the pass-fail statistics from fifty supervisory examinations taken by six thousand, two hundred one candidates over a seven-year period to ascertain the relevant racial and ethnic groupings. In the instant case, the litigation centered on one. As District Judge Weinfeld pointed out in the lower court opinion in *Vulcan*, 360 F. Supp. 1265, 1271 (S.D.N.Y. 1973), the consequence of relying upon one examination is "that any finding of discrimination and the relief to be granted will necessarily be restricted to the scope of the proof."

In view of the limited scope of the issues framed in this class action and the paucity of the proof concerning past discrimination, we feel that the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted.[24]

Moreover, once defendants have prepared a court-approved job-related civil service examination, a deliberate misuse of the resultant eligibility list on racial grounds

24 *See Chance* v. *Board of Examiners*, 458 F.2d 1167, 1179 (2d Cir. 1972).

would seem to be violative of both the New York and the Federal Constitutions.

Civil service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination. To the citizens of the State of New York, civil service was sufficiently important that they mandated its use by their constitution.[25] In so doing, they "declared in unmistakeable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service",[26] and that merit must be ascertained as far as practicable by competitive examination.[27]

The Congress recognized the social benefits inherent in a system of promotion based upon merit when it provided that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide merit system".[28] As pointed out by the Court in *Griggs, supra,* Congress did not intend "to guarantee a job to every person regardless of qualifications".[29]

The attack upon the content of civil service examinations, illustrated by *Vulcan* and *Bridgeport,* merely heralds future confrontations between the advocates of equal employment opportunities and the supporters of our civil service system. In the offing, surely, is an attack upon the provisions of § 61 of the New York Civil Service Law which requires that appointment from an eligible list be made

25 N.Y. Const. art. V, § 6 (1965).

26 *Palmer* v. *Board of Education,* 276 N.Y. 222, 226 (1937).

27 *Matter of Fink* v. *Finegan,* 270 N.Y. 356, 361 (1936).

28 42 U.S.C. § 2000e-2(h).

29 401 U.S. 424, at 430 (1971).

from one of the three persons standing highest on the list. It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and, if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators.

The courts of New York hold that one whose efforts secure for him a position upon a civil service promotion list "is entitled to consideration and protection in such position".[30] Whether this governmental benefit be termed a right or a privilege is of no significance; constitutional rights do not turn upon such issue.[31]

So long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be "bumped" from a preferred position on the eligibility list solely because of his race.[32] Unless the Fourteenth Amendment is applicable only to Blacks, this is constitutionally forbidden reverse discrimination.[33]

The smaller the group participating in a civil service examination, the more pointed the problem becomes. We can no longer speak in general terms of statistics and class groupings. We must address ourselves to individual rights.

30 *Barlow* v. *Craig,* 210 App. Div. 716, 719 (1st Dept. 1924); *Barlow* v. *Berry,* 245 N.Y. 500, 503 (1927).

31 *Sugarman* v. *Dougall,* 413 U.S. 634, 644 (1973).

32 Note Judge Feinberg's concern about "bumping" expressed in *U.S.* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971).

33 "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color." *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 209 (1944) (concurring opinion of Mr. Justice Murphy); *Commonwealth* v. *Glickman,* 370 F. Supp. 724, 736 (W.D. Pa. 1974).

A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be by-passed for advancement solely because they are white. As to such a situation, the following comments of Judge Mulligan in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission, supra,* are most pertinent:

> "We are discussing some 117 positions with time-in-grade requirements mandating three years' service as patrolman, sergeant and lieutenant postponing promotion to captain for a minimum of nine years. While this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes." [34]

We turn now to the remedial relief ordered by the District Court, which is both interim and final in nature. As interim relief, the court ordered that if defendants wished to make any appointments pending the development of a new selection procedure, they might apply to the court for permission to do so. The court directed that at least one out of four of the persons so promoted must be members of the plaintiff class. Since this portion of the decree is interim in nature, does not mandate the making of any

34 482 F.2d at 1341.

promotions, does not disregard an existing civil service eligibility list, and since its benefits are limited to the members of the plaintiff class, we affirm it as not being an abuse of the District Court's discretion.

Insofar as the order appealed from imposes permanent quota restrictions upon those who seek advancement by means of a court-approved job-related civil service examination, we reverse. The benefits of such order are not limited to the plaintiff class. Its quota requirements are based upon a shifting and rapidly expanding racial base, wholly unrelated to the consequences of any alleged past discrimination. It provides for appointment according to race without regard to the individual applicant's standing on a job-related examination and, indeed, without regard to whether the benefitted Black or Hispanic received a passing grade. It completely ignores the statutory requirements and constitutional purpose of the New York Civil Service Law and constitutes court-imposed reverse discrimination without any exceptional or compelling governmental purpose.[35]

Provisional Appointments

At the outset of the litigation, the District Court issued a temporary restraining order prohibiting defendants from terminating provisional appointments which had been made to members of plaintiff class. The terms of this order were carried over into Judge Lasker's opinion but were amended to state that such appointments might not be terminated solely because of plaintiffs' failure to pass examination 34-944. However, they were not incorporated into the final order and decree, and we cannot be sure that the District Court intended them to survive.

35 *See Matter of Board of Education* v. *Nyquist,* 31 N.Y. 2d 468, 475 (1973).

Appellants argue convincingly that under § 65 of the New York Civil Service Law provisional appointments are made only when there is no appropriate eligible list available for filling a vacancy and that therefore the making of such appointments bears no relationship to the constitutionality of examination 34-944. Appellants also argue that such order was discriminatory in that it applied only to minorities who failed the examination. We need not reach any of the foregoing questions, however, since, as we read § 65, provisional appointments are made only for periods of up to nine months and then terminate automatically unless a new provisional appointment is made. We do not read Judge Lasker's opinion as prohibiting termination for any reason unrelated to the failure to pass the examination or requiring the making of a new appointment at the end of the nine month provisional period.

Attorney's Fees

The District Court's award of attorney's fees cannot stand.

In *Stolberg* v. *Board of Trustees*, 474 F.2d 485 (2d Cir. 1973), we laid down the test of "unreasonable, obdurate obstinancy" on the part of the defendant as the determining factor in the award of counsel fees.[36] There is no claim of any such attitude on the part of defendants-appellants. Accordingly, we would have been reluctant to approve the awarding of counsel fees herein. In any event the matter has now been decided for us by the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 43 U.S. L.W. 4561 (U.S. May 12, 1975).[37]

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36 *See also, Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 497 F.2d 1112 (2d Cir. 1974).

37 Although an attorney may find lesser professional challenge in a Title VII proceeding than in an action under §§ 1981 and 1983, there are a number of reasons why the former procedure is preferable. The possibility of an award for attorney's fees is now one of them.

Disposition

1. We deny intervenors' application to dismiss the complaint.

2. We affirm the District Court's order insofar as it invalidates examination 34-944 and directs the preparation of a new non-discriminatory examination procedure.

3. We affirm so much of the District Court's order as requires the new testing procedures to be validated by means of empirical criterion-related validation techniques if feasible.

4. We reverse so much of the District Court's order as requires the new testing procedure to be submitted to plaintiffs for review.

5. We affirm that part of the District Court's order which provides a procedure for interim appointments if desired by defendant.

6. We reverse so much of the District Court's order as provides for promotion by quota following the establishment of new civil service testing procedures.

7. We reverse that part of the District Court's order which includes counsel fees as part of plaintiff's costs.

8. We remand to the District Court for such further orders as are required by and consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of December, one thousand nine hundred and seventy-five.

Calendar Nos.—445, 499

74-2116
74-2258

EDWARD L. KIRKLAND, etc.,

Plaintiffs-Appellees,

—against—

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, etc.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, and a poll of the judges in regular active service having been taken, and Circuit Judges Mulligan, Timbers, Gurfein, VanGraafeiland, and Meskill having voted against en banc reconsideration, and Chief Judge Kaufman and Circuit Judges Mansfield and Oakes having voted in favor thereof, and an opinion by Circuit Judge Mansfield dissenting from denial of en banc reconsideration, in which Chief Judge Kaufman and Circuit

Judge Oakes join, and an opinion by Chief Judge Kaufman dissenting from denial of en banc reconsideration, having been filed,

Upon consideration thereof, it is

Ordered that said request be and it hereby is denied.

Circuit Judge Feinberg took no part in consideration of the question whether to grant rehearing en banc.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

MANSFIELD, *Circuit Judge* (Dissenting):

(With Whom Chief Judge Kaufman and Judge Oakes concur)

I dissent from the denial of an *en banc* hearing in this appeal because the decision potentially places us in conflict with previous decisions in this and other circuits and creates uncertainty regarding this circuit's law on a question of exceptional importance that has been and will be frequently encountered, i.e., whether, and under what circumstances, relief in the nature of a racial goal or quota may be imposed to remedy injury caused to a minority group by use of racially discriminatory methods to hire or promote persons from a pool of potentially eligible candidates. In my view this question should be resolved now for the guidance of district court judges, members of the bar and litigants in the Second Circuit, rather than leaving them in a state of confusion regarding the issue.

Until the decision in this case, while adopting a cautionary stance and acting "somewhat gingerly," we nonetheless repeatedly have held that where racially discrim-

inatory methods are used to hire or promote persons in violation of the civil rights of others, the district court should have the discretionary power to remedy the effects of the unlawful conduct and compensate the injured class by requiring the hiring or appointment of a higher percentage of minority applicants. *United States* v. *Wood, Wire & Metal Lathers, Local 46,* 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society of the New York City Fire Dept.* v. *Civil Service Commission,* 490 F.2d 387 (2d Cir. 1973); *Rios* v. *Enterprise Association Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974); *Patterson* v. *Newspaper & Mail Deliverers Union,* 514 F.2d [illegible]7 (2d Cir. 1975).

The authority of a court of equity to issue such relief was recognized by the Supreme Court in *Louisiana* v. *United States,* 380 U.S. 145 (1965), where Justice Black, speaking for a unanimous Court, stated:

> "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154.

This was followed by the Court's recognition in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), that mathematical ratios might serve as a "useful starting point" in shaping a remedy for past constitutional violations. 402 U.S. at 25. Following this lead we, in *United States* v. *Wood, Wire & Metal Lathers, Local 46,* 471 F.2d 408 (2d Cir. 1973), approved an order directing a local union to take affirmative action to remedy the effects of past discriminatory practices in the issuance of work

permits by issuing 100 permits immediately to minority applicants, pointing out that

> "[W]hile quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not. *See* Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 n.47 (3rd Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); United States v. Ironworkers, Local 86, 443 F.2d 544, 553 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed. 2d 367 (1971); United States v. International Brotherhood of Electrical Workers, No. 38, 428 F.2d 144, 149 (6th Cir.), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); Local 53 of International Association of Heat & Frost I. & A. Workers v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970)." 471 F.2d at 413.

There followed our decision in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), wherein we upheld the use of a hiring quota to remedy the discriminatory effect of non-job-related examinations administered pursuant to the Civil Service provisions of the Bridgeport City Charter for the position of policeman, stating:

> "We commence with the basic tenet that the district court, sitting as a court of equity, has wide power and discretion to fashion its decree not only to prohibit present discrimination but to eradicate the effects of past discriminatory practices. Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 517, 13 L.Ed.2d 709

(1965); United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408, 413 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). Although most of the cases dealing with the issue of past discriminatory practices arose under Title VII of the Civil Rights Act of 1964, Section 1983 cases have also granted relief by sanctioning quotas aimed at curing past discrimination. See, e.g., Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc); Castro v. Beecher, *supra*, 459 F.2d 725; Carter v. Gallagher, 452 F.2d 315, 327-332 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972)." 482 F.2d at 1340.

Again, in *Vulcan Society of the New York City Fire Dept.* v. *Civil Service Commission,* 490 F.2d 387 (2d Cir. 1973), we approved the use of an interim quota to redress the discriminatory effect of non-job-related Civil Service examinations for the position of fireman and ordered the City to appoint one minority candidate for each three non-minority candidates appointed from a list of eligibles, stating:

"In arriving at a ratio midway between what would have been appropriate on the basis of correcting the inequities of Exam 0159 alone and the plaintiffs' demand for much more extensive relief, the judge took appropriate account both of the resentment of non-minority individuals against quotas of any sort and of the need of getting started to redress past wrongs. See Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965); United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408, 413 (2 Cir.), cert. denied, 412 U.S. 939, 93 S. Ct. 2773, 37 L.Ed.2d 398 (1973). As the Supreme Court has stated, 'The framing of decrees should take place in the District rather than in Appellate Courts.' International Salt Co. v. United States, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947); *Chance, supra,* 458 F.2d at 1178." 490 F.2d at 399.

Finally, in *Patterson* v. *Newspaper & Mail Deliverers Union,* 514 F.2d 767 (2d Cir. 1975), we approved an affirmative-action promotion program which would achieve a quota by advancing minority News deliverers faster than non-minority workers in order to compensate the minority group for injury suffered under the previous discriminatory promotion program. The effect was to temporarily restrain the advancement of White workers who would have been promoted under a program of strict seniority.

The United States Supreme Court has not yet had the opportunity to offer clear guidance on the appropriateness or parameters of remedies or programs granting a preference to groups that previously were subjected to discriminatory treatment. See *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). But seven other circuits, recognizing that "[t]he framing of decrees should take place in the District rather than Appellate Courts," *International Salt Co.* v. *United States,* 332 U.S. 392, 400 (1947), and that the district judge, who is better acquainted with the background and details of the case, should have broad discretionary authority to fashion appropriate relief, have upheld the authority of the district court, in the exercise of its broad powers as a court of equity, to establish goals or quotas for the purpose of remedying harm caused by past discriminatory conduct. See, e.g., *Boston NAACP* v. *Beecher,* 504 F.2d 1017, 1026-27 (1st Cir. 1974) (upholding hiring by ratios until percentage of minority fire fighters equals their percentage in population); *Castro* v. *Beecher,* 459 F.2d 725, 737 (1st Cir. 1972) (Blacks and Spanish-surnamed police candidates who failed old, impermissible test but pass new validated one should

be placed in priority pool to be selected by ratio of 1:1, 1:2, or 1:3 with respect to others as determined by district court); *Pennsylvania* v. *O'Neill,* 473 F.2d 1029 (3d Cir. 1973) (en banc) (upholding by equally-divided vote power of district court to order Black-White hiring by ratio corresponding to Black overall population and number of Black applicants); *NAACP* v. *Allen,* 493 F.2d 614 (5th Cir. 1974) (upholding hiring of Black-White state troopers in 1:1 ratio until Blacks reach 25% of force); *Morrow* v. *Crisler,* 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974) (ordering district court to impose further affirmative relief to remedy discrimination in state police employment practices; may include 1:1 or 1:2 Black-White hiring, the freezing of White hiring, or "any other form of affirmative hiring relief until the Patrol is effectively integrated"); *United States* v. *Local Union No. 212,* 472 F.2d 634 (6th Cir. 1973) (upholding district court order mandating 11% Black membership in apprentice programs); *United States* v. *International Bhd. of Elec. Wkrs.,* 428 F.2d 144 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970) (remanding to district court for consideration of appropriate affirmative relief); *United States* v. *United Bhd. of Carpenters,* 457 F.2d 210 (7th Cir.), *cert. denied,* 409 U.S. 851 (1972) (remanding to district court for fashioning appropriate affirmative relief); *United States* v. *N.L. Industries,* 479 F.2d 354, 377 (8th Cir. 1973) (court can order Black-White promotion in 1:1 ratio until 15% of foremen are Black); *Carter* v. *Gallagher,* 452 F.2d 315, 331 (8th Cir.) (en banc), *cert. denied,* 406 U.S. 950 (1972) (district court may order the hiring of firemen in 1:2 Black-White ratio until 20 Blacks hired); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 553 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971) (district court can order immediate job referrals to previous discriminatees and require union

training program to select sufficient Black applicants to overcome past discrimination). But cf. *Harper* v. *Kloster,* 486 F.2d 1134, 1136-37 (4th Cir. 1973) (upholding district court's denial of quota relief).

Turning to the present case, the district court, in order to compensate minority correctional officers for the harm caused the minority group by the discriminatory state civil service promotional system, odered the defendants to promote minority correctional officers to the rank of sergeant on the basis of one minority for each three non-minority appointments until the combined percentage of minority sergeants equalled that of the minority correctional officers. Once this goal was satisfied, defendants, of course, would be entirely free to select sergeants solely through the application of a non-discriminatory, validated examination. In adopting this relief Judge Lasker exercised the authority granted by our above-cited decisions. Yet despite the reasonableness of Judge Lasker's decree, this court's decision denies quota relief once a permissible test is created, seeking to distinguish our earlier decisions on the grounds (1) that there was insufficient proof of a "clear-cut pattern of long-continued and egregious racial discrimination" and (2) that there was substantial evidence that a quota would result in "identifiable reverse discrimination," thereby violating the Constitutions of New York and the United States as well as New York's Civil Service Law. With due respect, the first ground is not supported by the record before us and the second does not distinguish this case from all the previous instances where we have endorsed the use of hiring goals.

With respect to the nature and extent of past discrimination it is undisputed that the 1972 examination for promotion from correctional officer to sergeant was unconstitutionally discriminatory. If, by "egregious racial discrim-

ination" Judge Van Graafeiland means *intentional* or deliberate conduct, the law is settled that the existence of deliberate and intentional racial discrimination is not a condition precedent to the granting of quota relief. See *Bridgeport Guardians, Inc., supra,* where such relief was granted despite the fact that there was "no showing that the test [Civil Service test for appointment as policeman] was deliberately or intentionally discriminatory," 482 F.2d at 1336, and *Vulcan Society of the New York City Fire Dept., supra,* where in granting quota relief, the court made clear that proof of non-job-relatedness of the examinations was sufficient to satisfy the requirement of invidiousness, thereby placing the burden of justification upon the City's shoulders. 490 F.2d at 391 n.4. Although the defendants here did not maintain pass-fail data according to race or color for the examinations prior to 1972, there was ample evidence to support Judge Lasker's finding of prior racial discrimination in the state's promotional process. As of May 1, 1973, for instance, all 122 permanent sergeants were white. The pre-1972 examinations were prepared by the same process as the non-job-related 1972 examination, which did not meet constitutional standards, and resulted in the appointment of only two Blacks and no Hispanics to the rank of sergeant or above. Of 997 Whites and 46 Blacks and Hispanics who took the examination for sergeant in 1970 and who continued to be employed by the defendants in 1973, 9.4% of the Whites and 0% of the non-Whites passed. Although 25 Black correctional officers employed at the Ossining Correctional Facility took the examination for sergeant in 1968 and 10 to 15 Blacks took the examination in 1965, none passed. Surely this proof, all pointing in the direction of past unlawful discrimination against minority candidates, was at least sufficient to shift the burden of justifying the earlier examinations to the defendants, see *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Vulcan Society, supra,* 490 F.2d at 393; *Boston Chapter of NAACP, supra,* 504 F.2d at 1019. Yet, there is no indication that the defendants ever attempted to sustain this burden.

To reject the imposition of a minority quota as a compensatory remedy on the ground that it would discriminate in reverse against eligible White candidates for promotion ignores the district court's duty as a court of equity to remedy past wrongs. It should be recognized that at a minimum the plaintiff class in this case included a definite, identifiable group of aggrieved non-White individuals—those already in the correctional system who, while previously qualified for advancement, nonetheless failed to be promoted due to the application of the discriminatory test. Given the fact that the Whites who benefited from the discriminatory system retain their promotions, the aggrieved non-White members of this minority group would deserve quick promotion even under the most traditional notions of compensatory relief. The obvious problem is that, because discriminatory examinations were used, we are unable to identify those White correctional officers who were wrongfully promoted to sergeant and those Black correctional officers who under a non-discriminatory system would have been promoted. This problem, however, does not justify the court's throwing up its hands and entirely rejecting a goal as a means of making whole the injured members of the minority group. The effect of such rejection, of course, is not only to deny some non-White correctional officers the long overdue promotions to which they were entitled, but, by requiring them to compete afresh with late-comers once a non-discriminatory test is devised, it postpones their promotions even further. Thus the court's decision hardly promises to make whole the injured members of the minority group.

Although the court justifies its action partly on the ground that Judge Lasker's order permits appointment without regard to the individual applicant's comparative standing on a job-related examination or even to his receiving a passing grade, this represents but one facet of the relief, which can easily be rectified by providing that once a valid test is available, the correctional authorities legitimately may decide to test these non-White officers anew. Should they pass the valid test, however, they should be promoted preferentially without having to experience the delay of further competition on equal terms with those newcomers who never were previously aggrieved. See, e.g., *Castro* v. *Beecher*, 459 F.2d 725, 739 (1st Cir. 1972) (district court should mandate hiring of those in preferential pool as compared to others by ratio of 1:1, 1:2, or 1:3).

Thus the effect of the court's action is to provide wholly inadequate relief to those aggrieved. When one considers the other alternative remedy that might be employed to provide more effective relief, the use of a temporary goal or quota looks even more attractive as a salutary exercise of discretion. That alternative remedy, which would adhere most closely to the merit principle, would be to void and recall all past promotions made on the basis of the previous non-validated tests, since they were the products of unlawful discrimination in violation of the Equal Protection Clause, having served to "bump" eligible non-White applicants in favor of Whites. Such relief, however, would be extremely harsh, for by giving a fair opportunity to those minority officers who had been denied that opportunity under the discriminatory scheme, it would also serve to strip some White sergeants of a status that they already have come to enjoy and that they might have achieved even under a non-discriminatory system.

Faced with a choice of relief measures, the district court wisely chose to select the imposition of temporary goals

as the less drastic remedy. In analogous contexts, such as school desegregation cases, the Supreme Court has not hesitated to uphold the district courts' discretionary power to strike a fair balance and fashion an equitable remedy that compensates racial minorities for wrongs done, even though Whites as a class may be forced to accept undesired burdens. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-31 (1971); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969) (upholding faculty assignment to schools by White-Black ratio); *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968).

It is true that if promotion of the non-Whites in the existing and identifiable pool of correctional officers failed to satisfy the quota, the effect of Judge Lasker's decree would be to benefit some Blacks as a group at the expense of some Whites. This might explain the court's concern for "reverse discrimination." But all of the previously cited cases both in this circuit and outside have now established that such temporary burdening of Whites as a group is often necessary to effectively compensate for wrongs done to minority groups. As I hope I have shown, no remedy is perfect. Each must of necessity require some persons to forego some benefits. The advantage of an appropriately tailored goal or quota is that it goes the farthest toward remedying past wrongs with the least harm to others.

The fact remains that past non-job-related Civil Service examinations have resulted in the promotion of Whites only, denying eligible non-White applicants the chance to qualify on the basis of merit. Thus the Civil Service system, albeit not deliberately, was used to "bump" eligible minority applicants in favor of Whites. It would be ironic to allow adherence to the same civil service system, per-

version of which has caused the racial imbalance in promotions, to be used as a shield against an effective remedy for the wrong done in its name.

Nor can our prior decisions granting quota relief be distinguished on the ground that they dealt with unidentifiable White candidates rather than individually-identifiable qualified and eligible persons. In *Vulcan* the district court's interim decree upheld by us, under which the City would be required to appoint one minority candidate from the Civil Service eligibility list for each three non-minority candidates appointed, deferred appointment of some non-minority candidates "who had qualified under [Civil Service] Exam 0159 but had not yet been appointed." 490 F.2d at 391. Thus the non-minority group, some of whom intervened in the action, were "readily identifiable candidates for promotion," who, "regardless of their qualifications and standing in a competitive examination . . . [might] be by-passed for advancement solely because they are white," see *Kirkland* v. *New York State Department of Correction, supra,* Slip Opin. at 5413. Similarly, in *Bridgeport Guardians, Inc.* the intervening defendants included persons "who have a high standing on current eligibility lists, and presumably would be appointed to the force but for the decision below," 482 F.2d at 1334. Likewise in *Patterson* v. *Newspaper & Mail Deliverers, supra,* we upheld a quota against challenge by 100 identifiable News White workers who were permitted to intervene for the purpose of challenging the quota relief on the ground that its effect would be to "bump" White workers in favor of minority workers. 514 F.2d at 769.

All of this is not intended to denigrate the problems of fairness and justice raised by the White intervenors in these cases. But references to "identifiable" Whites, while perhaps placing the consequences of a goal into sharper

focus, do not add to the reality that, irrespective of the identifiability of the Whites, a goal inevitably serves to benefit some at the expense of others and that this court as well as most others nonetheless have come to recognize its necessary inclusion in the district court's remedial arsenal. The wisest and fairest course that we could follow is not to reject this remedy but to specify the smallest quota in terms of percentage and duration necessary to correct the past discrimination. See, e.g., *Rios, supra,* 501 F.2d at 628 n.3; *Vulcan Society, supra,* 490 F.2d at 399. This heretofore clearly has been our policy and the goal proposed by the district court in this case is perfectly in line with previously tolerated remedies.

For these reasons I believe it is unfortunate that the court has not seen fit, by hearing this case *en banc,* to seize this opportunity, absent guidance from the Supreme Court, to clarify our position with respect to the constantly recurring and troublesome question presented.

KAUFMAN, *Chief Judge* (Dissenting):

I concur in my brother Mansfield's scholarly opinion. I should like to add the following thoughts, however. As Judge Mansfield's opinion makes clear, this Court has traveled too far along the road of temporary "goals" as a remedy for past discrimination to permit a single panel to appear to reverse the course consistently followed. It is my view that we can retrace the steps taken by previous panels of this Court only by an en banc, F.R.A.P. 35(a), or by a Supreme Court holding that our earlier decisions have been in error. I am still of the view that the en banc device is often cumbersome and unproductive of the definitive resolution for which it is invoked, *see, e.g., Rodriguez* v. *McGinnis,* 456 F.2d 79 (2d Cir. 1972) (en banc), *rev'd*

sub nom. Preiser v. *Rodriguez,* 407 U.S. 919 (1973). But, the issues in the present case are so sharply defined and our prior holdings so clearly applicable that an en banc would have achieved the goal of "maintain[ing] uniformity of [our] decisions." F.R.A.P. 35(a).